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THE

N. Y. WEEKLY DIGEST

OF CASES DECIDED

IN THE

U. S. Supreme Circuit, and District Courts, Appellate
Courts of the several States, State and City
Courts of New York and English Courts.

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AGENCY.

N. Y. SUPREME COURT—GENL. TERM,
FIRST DEPT.Fowler, *et al. respts.* v. The New York
Gold Exchange Bank, *applt.*

Decided December 30, 1875.

A principal who ratifies the act of a voluntary agent who receives money for his principal and makes a loan in his behalf as a condition of such receipt, is entitled to receive the money so paid to the agent upon the repayment of the loan made by the Agent.

A voluntary agent is entitled to be reimbursed for expenses incurred in behalf of his principal, on the ratification by the principal of the agent's act.

This appeal is from a judgment in plaintiff's favor, for \$94,255 $\frac{1}{10}$ upon the report of a referee.

The facts out of which the action arose are as follows: On September 23, 1869, the day before what is known as "Black Friday," the plaintiffs composing the firm of Fowler Brothers, wishing to sell \$50,000 of American Gold, gave an order to James Brown & Co., brokers, to sell that amount of gold for them. J. Brown & Co. on the same day executed this order, and sold for plaintiff's account fifty-thousand dollars gold coin for settlement on September 24, 1869, the next day at \$1.41 $\frac{1}{2}$ in currency for each dollar of gold coin, such sale being to the firm of Chase, McClure & Co. On the same day J. Brown & Co. gave, and plaintiffs received in due course of business, notice of such sale.

Chase, McClure & Co. on the same day gave up to J. Brown & Co. the name of Chapin, Bowen & Day as the parties who would receive and pay for the gold in lieu of themselves, and the substitution was accepted. Defendant was the clear-

ing house of the New York Gold Exchange.

The next day (Black Friday), was a day of extreme confusion, and parties having outstanding contracts in gold to be settled on that day through the defendant, were requested by defendant's president to clear outside of the defendant as a clearing house.

J. Brown & Co. acted on this request and settled all their contracts outside of the defendant.

J. Brown & Co. immediately intending to settle outside the bank and deliver the gold, sent to Chase, McClure & Co. to say that they, J. B. & Co., wished them to pay for the \$50,000 gold they had bought from them at \$1.41 $\frac{1}{2}$. Chase, McClure & Co. referred J. B. & Co. to Chapin, Bowen & Day, who they said would pay for it and take the gold. On going to Chapin, Bowen & Day they informed J. Brown & Co. that they, C. B. & D., had given the currency due to the defendant, and obtained from the defendant \$50,000 gold which they were to receive.

When the contract was made it was expected to be settled through the defendant. The practice in such settlements was as follows: The parties selling sent a ticket to the defendant requesting the defendant to deliver the amount of gold sold and receive the amount of currency thereon specified, and the party purchasing sent a ticket or request to the defendant to receive the amount purchased and pay the price in currency specified. These tickets authorized the defendant to perform the requests contained in them.

But J. Brown & Co. having sent in no statement and acting on the request of defendant's president to settle outside, endeavored to settle accordingly. But the tickets in this transaction with Chase, McClure & Co., having gone into the bank, the defendant, and not recalled or withdrawn, through inadvertence and the confusion and excitement then exist-

ing, this contract was settled by defendant for account of the parties thereto.

Plaintiff's brokers applied to the bank for the currency. The defendant did not comply with the demand and stated they were in the hands of a receiver. The plaintiffs being unable to settle the matter amicably, made a tender to the defendant on the 30th of September, 1869, of \$50,000, of gold coin, and demanded the \$70,625, received for their account by defendant.

The defendant refused to receive the gold or deliver the currency, whereupon this action was brought. On the foregoing facts, the referee found judgment for plaintiff.

F. F. Marburg, for respts.

W. H. Scott, for applt.

On appeal,

Held, That the defendant had voluntarily paid from the resources in its hands \$50,000, gold coin, and received for plaintiffs through their brokers \$70,625, in currency. No want of diligence on the part of plaintiff to deliver the gold under the circumstances can be claimed. The advancement of the gold was substantially a loan of it by the defendant to Brown & Co. for plaintiffs, and upon the tender by J. B. & Co. of the \$50,000 gold, they had the right to receive the \$70,625, currency, in the hands of the defendant belonging to the plaintiffs.

If the gold had been purchased by the defendant, or procured from some other source by which it was subject to expense in the transaction in its conduct as agent for the plaintiffs or their brokers, J. Brown & Co., the principal, J. B. & Co., on the ratification of an act of that nature, would probably become bound to protect and fully reimburse the agent, the defendant. But it was not even alleged in its answer, or in any of the interviews shown by the evidence, that defendant had been subjected to any expense or trouble whatever in obtaining the gold delivered to it; and it is not

probable that the defendant was put to any expense or made any advance for the purchase or procurement of the gold. It was drawn out of the fund it had on hand for clearing purposes. The findings of the referee are supported by the evidence, and support his conclusions of law.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady J.* concurring.

ARBITRATION.

N. Y. SUPREME COURT.—GENL. TERM,
FIRST DEPT.

Walter S. Pierce, *et al.*, *applt.*, v. Morrisson, *respt.*

Decided December 30, 1875.

Although one member of a firm cannot bind his co-partners by submission to arbitration without direct authority, any expression of intent to give such authority by the non-signing partner is sufficient to bind him.

The intendments are in favor of the validity of an award.

Action brought to recover the sum of \$2,270.67, claimed to be due the plaintiffs from defendant on an arbitration and award.

The plaintiffs, Walter S. Pierce and Junius J. Pierce, composed the firm of Walter Pierce & Co., and one of the plaintiffs, Junius J. Pierce, and defendant composed the firm of Pierce, Morrisson & Co. The latter firm was dissolved July 26th, 1872.

On the same day an agreement was made between the said plaintiff, Junius J. Pierce, and Edward H. Morrisson, the defendant, as to the terms of dissolution of their firm of Pierce, Morrisson & Co. In and by the agreement the defendant agreed with his co-partner, the plaintiff, Junius J. Pierce, to assume and pay "all

the indebtedness of whatsoever nature there may be of said firm, in full."

Subsequently, on October 4th, 1872, said Junius J. Pierce and the defendant entered into another agreement, which recited the agreement of July 26th, 1872, for dissolution also, that the accounts between Pierce, Morrison & Co., (the dissolved firm) and Walter S. Pierce & Co., were unsettled and the balance unascertained, and provided that for the purpose of ascertaining such amount, in case Junius J. Pierce and E. H. Morrison could not agree thereon, the settlement thereof should be referred to the plaintiff, Walter S. Pierce and one R. M. Watrus, with power if they could not agree to select a third party to decide between them, whose decision should be final. This agreement then provides that upon the ascertainment of the amount of said indebtedness by either of the above mentioned means, one David Clopton, the depository of an accepted draft, was authorized and required to apply the same or so much thereof as might be necessary to the payment of said amount.

In consequence of the last named agreement, the arbitrators and umpire made an award, that E. H. Morrison should pay Walter S. Pierce & Co., \$2,270.67 and also decided certain other questions.

The answer set forth the written instruments set forth in the complaint and claimed the said award was void.

The plaintiffs, to maintain their case, put in evidence the instruments alleged in the answer.

The defendant moved for judgment on plaintiff's proofs.

Upon the referee's report in defendants' favor judgment was entered.

The agreement of October 4th, 1872, providing for the arbitration was signed by J. J. Pierce, but with the knowledge and consent of the co-partners.

It was proved on the trial before the referee, that after a copy of the award had

been sent to the defendant, on application to him by plaintiff, Walter S. Pierce, for payment of the amount awarded, he made an unqualified promise to pay.

A. H. H. Dawson and J. S. L. Cummings, for applt.

E. T. Hyatt and Thomas Allison, for respts.

Held. Although the weight of authority may be in favor of the rule that one partner cannot bind his co-partners by submission to arbitration, yet any manner of actual authority given by one partner to his co-partners will be sufficient to bind the firm. It is enough whatever its form, if it contains a distinct expression of the intent to allow the partner acting to do it for him. In this case the partner who signed the agreement represented the firm in signing it, and signed it with the knowledge and consent of his co-partner, Walter S. Pierce, established by his presence and participation in the arbitration proceeding. The non-signing partner having consented to and authorized the signing by the other, and having subsequently ratified the deed thus done, by acts and words, rendered the submission mutual and binding on both him and the defendant.

That the award embraced the subject confided to the arbitrators.

The interdictments are in favor of the validity of an award. The referee erred in rendering judgment for the defendant.

New trial ordered, costs to abide the event.

Opinion by *Brady, J.*; *Davis P. J.* and *Daniels, J.* concurring.

BANKRUPTCY. EXEMPTION

U. S. DISTRICT COURT, GEORGIA.

In re Stewart and Newton, 13 N. B. R. 295.

No individual exemption can be allow

ed out of a partnership estate at the expense of the joint creditors.

The firm of Stewart & Newton, and Stewart individually, were bankrupts. The partnership estate reduced to cash amounted to \$1,000. Stewart, as the head of a family, claimed this amount as exempt under the bankrupt act, and the State constitution and laws.

Held, Erskine, J., notwithstanding the courts had entertained conflicting views upon this subject, the weight of authority was against the allowance of the claim here advanced.

(*In re Handlin*,) 12 N. B. R. 49.

BANKRUPTCY. PREFERENCE. EXEMPTION.

U. S. DISTRICT COURT, E. D. MICHIGAN.

In Re James Thompson.

13 N. B. R. 300.

Payment to counsel for services in preparing bankrupts' petition and schedules is not preferential.

Bankrupt is entitled to an allowance in money from his estate for the temporary support of himself and family, not exceeding, with his furniture and other articles, five hundred dollars.

He is not entitled to receive the probable expenses of procuring his discharge.

The bankrupt was adjudged a bankrupt on his own petition, on June 10th 1875; two days prior to this, and upon the same day upon which his petition and schedule were drawn, he raised \$1,000 upon his real estate, out of which he paid his counsel \$110 for drawing his petition, &c. The balance he held. The assignee petitioned for an order that he account and pay over. The bankrupt claimed the payment to counsel; that he should be allowed to retain sufficient to pay the expenses of procuring his discharge, and

that he had a right to reserve enough to pay the expenses of his family for a reasonable time.

Held, Brown, J., 1. That as the payment to counsel was made at the time the services were performed, that a bankrupt had a perfect right to employ counsel and to pay him, such payment ought not to be regarded as a preference or a fraud on the act; that the preparation of the petition and schedules was a work requiring skill, and as it was the duty of the insolvent upon discovering his insolvency to go into bankruptcy, it was quite proper to employ counsel and pay him. It might be otherwise if the service had been performed on credit and the money afterwards paid. The question of preference might then arise.

2. That the debtor has no more right to receive or reserve the cost of professional services to be rendered after his adjudication than to reserve money for any other future purpose.

3. That the word "necessaries" in section 5,045 of the act, includes money, and that the assignee—taking into view all the circumstances of each case—can, subject to the final decision of the court, allow the bankrupt such sum from the estate as he may deem proper for the temporary support of the bankrupt's family, not exceeding, with his furniture and other property, five hundred dollars.

BANKRUPTCY. LIMITATIONS.

U. S. CIRCUIT COURT, LOUISIANA.

Norton, assignee, v. De La Villebeauve,
13 N. B. R. 304.

An action by an assignee is barred by the two years' limitation, although the assignee may not have discovered the right of action until after its expiration.

The limitation applies as well to those causes of action which existed prior to the adjudication in bankruptcy

as to those which arise subsequently.

Action brought to establish title to and recover possession of land in possession of and claimed by defendant. The defendant among other defenses pleads the statute of limitations of two years, found in section 2 of the Bankrupt Act.

Plaintiff and defendant both claim title from the same source, from Person the bankrupt; the plaintiff by virtue of his office as assignee, and the transfer to him of all the property of the bankrupt, and the defendant by virtue of a sale, before the bankruptcy of Person, under a mortgage foreclosure.

Person was adjudged a bankrupt on the 9th of March, 1868; plaintiff was appointed his assignee on the 22nd of April, 1868, and this action was brought on the 21st of August, 1871, over three years after the appointment of plaintiff as assignee. The plaintiff did not discover the property and his right thereto until about the 1st of July, 1871, about seven weeks before the commencement of this action.

Held, That the question presented is, does the fact that the plaintiff was ignorant of his rights relieve him from the bar of the statute; that no case could be found sustaining plaintiff's views; that if it had been the intention of the law-making powers that the limitation should begin to run from the time the plaintiff discovered his right of action, and not from the time his right of action accrued, it would have said so in unmistakable terms; that to introduce such an exception into the statute, would be an act of legislation on the part of the courts, and would be directly contrary to the policy of the Bankrupt Act, which looks to the speedy settlement of the bankrupt affairs.

It might be equitable in some cases that this view of the plaintiff should prevail, but it is not competent for the courts to engraft other exceptions on the statute, even on the ground that they

are within the equity of those expressed. (*Bank of Alabama v. Dalton*, 9 Howard 522. *McIver v. Ragan*, 2 Wheaton 25, *Bucklin v. Ford*, 5 Barb. 393; *Hudson v. Carey*, 11 Sergt. & Rawle, 10.) The plaintiff has been under no disability to sue; the courts have been open to him, and the defendant at all times liable to be sued by him. The limitation provided had run against him before this action was brought. He falls within the Act and the law makes no exceptions.

2. The theory urged that the limitation applies only to new causes of action arising in favor of the assignee after the bankruptcy, and not to those which existed before the bankruptcy, and had come to the assignee by the assignment, could not be maintained. The provisions of the 14th and 16th sections of the Bankrupt Act are not susceptible of any such construction; it is too narrow. The provisions of the 2nd, 14th and 16th sections must be construed together. So considering them their meaning appears plain, and the effect of the three sections is this: the assignee may sue for and recover the estate, debts and effects of the bankrupt in his own name, and have the like remedy to recover the same as the bankrupt might have if the decree in bankruptcy [had not been rendered and no assignment had been made, provided his suit for that purpose is brought within two years from the time the cause of action accrued to him. On all matured claims and demands the cause of action accrues to the assignee at the date of the assignment; all others from their maturity or at the time an action will lie, and he must sue within two years from these dates respectively.

Judgment for defendant.

Opinion by Wood, J.

BANKRUPTCY. STOCKHOLDERS.

U. S. SUPREME COURT.

Mary Sanger, *reft. in error vs.* Chas. W. Upton, Assignee, &c., *def't in error.*

Decided October Term, 1875.

The U. S. District Court upon adjudicating a corporation bankrupt, and appointing an assignee, may make an order requiring stockholders to pay to the assignee an unpaid balance upon the stock severally held by them; and such order may be made without notice to the stockholders, and cannot be attached collaterally.

The assignee, upon non-compliance with such order, may sue any stockholder, in an action at law, to enforce his liability, or he may maintain a bill in equity against all the delinquent stockholders jointly.

The capital stock of an incorporated company is a fund set apart for the payment of its debts, upon which creditors have a lien in equity. As regards creditors, unpaid stock is as much a part of the assets as any other property of the company, and they have the same rights so insist upon its payment as upon the payment of any other debt due the company.

Although there was no evidence that defendant subscribed for the stock or made any express contract with the company in regard to it, having bought, paid for it, (20 per cent.) and received a dividend on it, she was liable.

In error in the U. S. Circuit Court for the northern district of Illinois.

The original charter of the Great Western Insurance Company, of which defendant in error is assignee, fixed its capital at \$100,000, which by an amendment was increased to \$5,000,000. It became insolvent and was thrown into bankruptcy February 6, 1872; the assignee applied to the district court for and procured an order that the balance unpaid upon the stock held by the several stockholders should be paid to the assignee on or before August 15, 1872; the assignee gave notice pursuant to the order, and demanded payment of each stockholder, the plaintiff in error being away then. It

was claimed she was the owner of \$10,000 of the stock, upon which it was alleged there was due sixty per cent. The original charter required the payment of five per cent. of the capital stock, and that the balance should be secured in the manner prescribed. The amended charter is silent upon the subject. The stock certificates issued by the company set forth that twenty per cent. was to be paid in four quarterly installments of five per cent. each; "the balance being subject to the call of the directors, as they may be instructed by the majority of the stockholders represented at any regular meeting." This was a regulation of the company, and not a requirement of either the original or amended charters. It did not appear that any call was ever made by the directors or authorized by the stockholders.

The plaintiff in error having failed to pay pursuant to the order of court this suit was instituted by the assignee.

Held, 1. The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the district court, by the bankrupt act to make it; it was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree in bankruptcy was pronounced. The plaintiff in error cannot in this action question the validity of the order; her only remedy would be a direct application to the court for its revocation or modification. It was competent for the court to order the payment, as the director, under direction of the stockholders, might have done before decree in bankruptcy, but inasmuch as any regulation or agreement between the stockholders as to the time and manner of payment, or that it shall never be paid, is fraudulent and void as to creditors, the court was not bound to regard it, and was fully justified in calling in the entire balance.

2. The capital stock of a corporation is

a fund set apart for the payment of its debts; it is a substitute for the personal liability which subsists in private copartnerships; when debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demand. The creditors have a lien upon it in equity; and if diverted, they may follow it as far as it can be traced, except in the hands of bona fide holders, without notice. The creditors have the same right to look to it as to any thing else, and the same right to insist upon its payment as upon the payment of any other debt.

3. By the deed of assignment all property of the company passed to the assignee; he had, by the statute (Sec. 5, 047) the same right to sue, and in the same form as the company. The liability of plaintiff in error, and the right of the company were legal in their character; the assignee therefore, had a right to sue in an action at law. He might also have filed a bill in equity against all the delinquent shareholders jointly (Oglevie & Knox Ins. Co., 22 How., 380).

4. That although there was no evidence that plaintiff in error *subscribed* for the stock or had made any express contract with the company in regard thereto, it appearing that she had bought it, made the required payment, had received a dividend and treated it as her own, she was estopped from denying her ownership.

Judgment affirmed.

Opinion by *Swayne, J.*

CONTRACT.—ESTOPPEL.

N. Y. COURT OF APPEALS.

Coulter, applt. v. Board of Education for the City and County of New York, respts.

Decided December 7, 1875.

Where a party, under a contract, agrees that no charge for extra work

shall be made after he shall have given a certificate that all claims for work are included in the payment demanded when he delivers his certificate, is estopped from claiming for extra work after receipt of the payment so demanded.

The clerk of a board of school trustees has no authority to change the effect of such a certificate.

This action was brought on a contract between the school trustees of the Eighth Ward, in New York City, and plaintiff, to recover for extra work, furnished at the request and with the consent of the defendants. The contract provided that the last payment should not be made until (among other things), a certificate made by plaintiff had been filed, "that all claims and demands for extra work, under, or in connection with, the contract, have been presented to the party of the first part (defendant). and the amount to be paid therefor agreed upon, by and between them, or a majority of them, and the party of the second part, and that such payment is in full of every claim or demand in the premises, except the amount so agreed upon for extra work." Plaintiff gave a certificate as provided by the contract, and the last payment made.

Held, That by giving the certificate, plaintiff induced the defendant to make the payment, and is precluded from afterwards setting up other claims; that the certificate under the contract amounted to a waiver of other demands, and as there was no evidence of fraud or mistake, the contract must be carried out according to its terms.

There was evidence given by plaintiff that the clerk of defendant told him, when he signed the certificate, in substance, that it applied to extra work. No such fact was found by the referee before whom the case was tried.

Held, That this was not material, because the clerk had no power to change the effect of the certificate, and because the fact was not found.

Judgment of General Term, affirming judgment entered on report of referee for defendant, affirmed.

Opinion by *Church, C. J.*

CORPORATIONS—DIVIDENDS.

CONNECTICUT SUPREME COURT OF
ERRORS.

Beers et al, vs. Bridgeport Spring Co.

Decided January Term, 1875.

A corporation having declared a dividend, "payable at such time as the board may direct," and credited it to the stockholders on the books, will be compelled, by a Court of Equity, at the suit of a stockholder, to pay within a reasonable time.

In so far as the dividends are concerned, the right of the individual stockholders is adverse to the corporation and to every other stockholder; they become his several and distinct property, which cannot be disposed of or dealt with by the corporation without his authority or consent.

Their application to the enhancement of the corporate business and property is unauthorized and constitutes no reason for the corporation's refusing to pay.

That the directors have ordered the dividends already declared to be transferred from the individual account of the stockholders to an account to be known as a Surplus Fund account, from which all dividends were to be paid, does not affect the rights of any stockholder not assenting thereto.

The directors of a corporation unreasonably refusing, may be compelled to declare a dividend by a Court of Equity, which may also protect the rights of the minority of the stockholders, where they are disregarded.

Bill in equity to compel the defendant, a corporation, to pay over certain dividends claimed to have been declared by the directors.

Several dividends had been declared and paid in cash, and from time to time, between July 1867 and July 1870, dividends had been declared, amounting in

the aggregate to 115 per cent., which, by the terms of the resolutions declaring them, "were to be placed, *pro rata*, to the credit, on the books of the company, of each stockholder, and made payable, without interest, at such time as may be directed by the board."

On July 13, 1872, the directors ordered the 115 per cent. of earnings previous to July, 1870, "and now standing credited, *pro rata*, to each stockholder * * * shall be taken from the account of each stockholder, *pro rata*, and carried to an account to be known as a surplus fund account."

At a subsequent meeting they "Resolved, that all dividends hereafter made, shall be declared from the account known as the surplus fund account, till the full amount of 115 per cent. on the capital stock be paid."

The action of the directors transferring the 115 per cent. to the surplus fund account, was taken without the knowledge of complainants.

The dividends were all earned in money which came into the treasury from time to time and were invested, and have continued to be, as they were earned, in real estate, machinery, tools, &c.; proper and necessary to the business, and have been in no wise lost or impaired, but exist in the form of the investment stated; the directors acted in good faith in making the investments.

If the defendant is compelled to pay, within a comparatively short time, the whole of the 115 per cent. to the stockholders, the corporation will be required to contract its business and encumber its property to such an extent as to seriously impair, if not actually to destroy, its credit and business.

Prior to bringing the action complainants demanded payment of the dividends.

Held, 1. That when defendant declared the dividends in question, and ordered the amount to be placed, *pro rata*, to the credit of the stockholders, the share of

each stockholder in the several amounts was thereby severed from the common funds of the corporation, and became his individual property; that thenceforth the company owed him a debt, payment of which, at a proper time, he might demand, and upon refusal enforce by the aid of a Court of Equity. (*King v. P. & H. R. R. Co.*, 29 N. J., 504; *Redfield on Railways*, 1st ed., 240, 597; *Le Roy v. Globe Ins. Co.*, 2 Edwds. Chcy., 657.)

2. That the proviso that the dividend should be paid "at such time as the board may direct," was, in legal effect, that the debt was to be paid within a reasonable time; that the corporation having declared it, had received for and owed to each stockholder a certain sum of money, and having set the same apart from its own funds for his sole and separate use, could not thereafter nullify its votes or repudiate its obligations, by declining to pay the dividend or to name any time when it would pay.

3. That in so far forth as the share of the profits set to him as a dividend is concerned, the interests of each stockholder became not only several and distinct from, but positively adverse to, those of every other stockholder and of the corporation itself; that the directors cease to represent him in relation thereto, and cannot dispose of or deal with the same in any manner without his authority or consent, and that the vote of July 13, 1872, could in no wise affect his rights to dividends before declared, he not assenting thereto.

4. That the fact that the corporation might be seriously injured or perhaps destroyed if compelled to pay within a short time, was not of sufficient force to justify a denial of the relief demanded, but requires the court to be cautious as to the manner in which the relief shall be granted.

5. That there can be such a condition of things as will justify a court in compelling directors to declare a dividend

contrary to their judgment, and therefore, of course, circumstances may justify a court in compelling them to pay dividends already voluntarily declared (*Scott v. Eagle Ins. Co.*, 7 Paige, 203; *Pratt v. Pratt*, 33 Conn., 456); that one of these dividends having been declared more than seven years, another more than six, &c.; the rust of interest meanwhile consuming them; the majority still refusing to indicate any time of payment; and practically claiming the right to retain them so long as they can profitably use borrowed money for which they pay no interest, shows a state of affairs which amount to an inequitable infringement of the minority's rights, calling for our interposition.

6. The findings in this case not presenting the details of the investments of the company with sufficient particularity to enable this court safely to name a day for the payment of the declared dividends, the court below is advised to ascertain, upon further hearing, at what time or times the same can be paid without serious injury to the company, and to decree accordingly.

Opinion by Pardee, J.

DEMURRER.

MARINE COURT, CITY OF NEW YORK.

John Arrell, v. Henry Ossusky and Morris Levy.

Decided January 15th, 1876.

A complaint uniting in one statement two causes of action, growing out of same act, but against different parties, not demurrable.

Complaint shows that one Philip Daly leased to defendant, Ossusky, for two years and six months premises in Forty-sixth Street at \$28 per month, from February, 1875, at which time defendant, Levy, became surety to P. D. for said rent; that on July 31, 1875, plaintiff bought all right and title of P. D. in said lease and same was transferred and Ossusky acqui-

esced, that there is unpaid \$58, and demands judgment against both O. and L. Defendants demurred to complaint.

1. That several causes of action have been improperly united; one being for rent against tenant, and the other a demand against surety for such rent.

2. That complaint does not state facts sufficient to constitute a joint cause of action against defendants.

Spencer L. Hillier, atty. for plaintiff.

Simon M. Roeder, atty. for defendant.

Held, The defendants contend that *Henderson v. Jackson*. 9 Abb. N. S., 293, is opposed to the whole current of authority. This is believed to be a mistake. "The weight of decision is in its favor, notwithstanding the very pointed case of *Anderson v. Hill*, 53 Barb., 238, of which, however, it may be said that the question of the appropriateness of the remedy is not discussed or alluded to in the *opinion*, although the objection was distinctly taken on the argument of the case. The cases in opposition are *Blanchard v. Strait*, 8 How. Pr., 83; *Wood v. Anthony*, 9 Id., 78; *Lord v. Vreeland*, 13 Abb. Pr., 195; and *Cheney v. Fiske* 22 How. Pr., 236. This last case, very singularly, is a general term decision, made in 1860, of the supreme court of the *same district* that made the decision in *Anderson v. Hill*, *supra*, but is not referred to in the opinion in the latter case. In *Cheney v. Fiske* the court says, 'If a single count or statement of a cause of action, or one that professes to be that, is found upon examination to contain more than one cause of action, it is not demurrable, *although the two causes, if stated separately, might not be united in one action*, but in such case the remedy is by motion. This case decides the precise question raised in *Anderson v. Hill*, but not passed upon directly, at least in that case." 9 Abb. Pr. N. S., 298.

If necessary, *Anderson v. Hill* may be distinguished from the present case. It

united in one count the blows struck and the slanderous words spoken by the defendant in one and the same affray. "To allow," says the court in *Sheldon v. Lake*, 9 Abb. N. S., 309, "the uniting in one statement of a cause of action consisting of different trespasses (where they all substantially arose out of the same act), such as the statement of an assault, an assault and battery and false imprisonment, does not prejudice the defendant, since he may in his answer confess, deny, or justify each separate act; while to regard them as separate causes of action and subjects of different suits, would be allowing an unwarrantable splitting up of controversies."

In *Henderson v. Jackson* the two causes of action were against one and the same defendant, and here they are against different defendants. But the reason for not allowing a demurrer where they are blended in one count applies with equal force. And until the complaint is made to conform to the requirements of the code and rules of court, the court will not take upon themselves the labor of ascertaining whether two causes of action are in fact stated." 9 Abb. N. S., 296.

The assignment of the lease carried with it the assignment of the guarantee; and the complaint states a sufficient cause of action against *Levy*.

Demurrer overruled, with costs of one demurrer.

Defendants, upon payment of costs, to have six days to answer.

Goepp, J.

DISORDERLY HOUSES. ARREST OF JUDGMENT.

SUPREME COURT, GENL. TERM, FIRST DEPT.

Jacobowsky, plff. in error v. The People, defts. in error.

Decided January 28th, 1876.

Motion in arrest of judgment should be

made on supposed defects in the record and not on mere defects of evidence.

Remedy for defective proof is by way of objection and exception.

A house of prostitution wherein there is fighting and drinking is within the statutory provision for disorderly house.

Writ of error to the General Sessions.

The prisoner was keeper of a house of ill-fame, which the indictment charged as being noisy, disorderly and a common nuisance, and the evidence showed that to have been its character.

The court charged among other things that if the jury believed the officer, who testified that people were fighting and drinking in the prisoner's house and that it was a house of prostitution, it was within the provisions of the law, but refused to charge that they must find that the house was a public nuisance, in order to commit the prisoner.

Verdict of guilty.

Counsel for defence moved for arrest of judgment for defect in the proof and error in the charge, which was denied.

Mitchell Laird for plff. in error.

B. K. Phelps for defts. in error.

On appeal, *Held*, That motions in arrest of judgment are made not upon mere defects of evidence, but upon supposed defects in the record itself of which the evidence given on the trial forms no part.

The remedy for defective proof is by way of objection and exception upon the trial; without such an exception, it cannot be raised after conviction in cases of this description.

It was sufficient to bring the case within the offence charged, if it was proved that people were fighting and drinking in the house and that it was a house of prostitution.

The prisoner in this case was properly convicted and judgment should be affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

DOWER. TITLE.

N. Y. COURT OF APPEALS.

Schiffer, applt, v. Pruden, respnt.

Decided January 25, 1876.

A right of dower is not divested by the mere finding of the referee that the wife has been guilty of adultery; it can only be done by a judgment of divorce granted upon such finding.

This action was brought to compel the defendant to perform his contract to purchase certain lands, by paying the consideration money agreed upon, and taking a deed from plaintiff. Defendant objected that plaintiff was not able to give a *good title*. It appeared that the immediate grantor of the plaintiff had, when he conveyed to the plaintiff, and still has, a wife living. The wife did not join in the deed, and has not at any time released any interest she had in the premises. Plaintiff proved that in an action for a divorce *a vinculo* brought by D. against his wife on account of her adultery, it was found by the referee that she had committed adultery, as alleged in the complaint, and that D. had also committed adultery, and a judgment of divorce between them was denied and the complaint dismissed; and it was claimed that the finding of the referee was a conviction of the wife of D. of adultery, and that she is thereby barred, or has lost her right to be endowed in these lands—according to the provisions of 2 R. S., § 48, p. 146—which enacts that “a wife being a defendant in a suit for divorce brought by her husband, and convicted of adultery, shall not be entitled to dower in her husband's real estate.”

Chas. Jones, for applt.

J. Edgar, for respnt.

Held, That the word “conviction,” as used in said section, means that upon the proof and finding or verdict of the adultery of the wife, the court has given judgment of divorce against her and dissolved the marriage between her and the husband

(52 N. Y., p. 593); and that therefore, although the referee found that the wife of D. had committed adultery, yet, as she was never adjudged therefor to be divorced from her husband, she is still his wife, and is entitled to her dower and rights in his lands, and that this possibility of dower affects the title tendered and relieves plaintiff from a performance of his contract.

Judgment of the General Term in favor of the defendant affirmed.

Opinion by *Folger, J.*

EVIDENCE.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

The New York Dyeing and Printing
Establishment vs. Berdell.

Decided December 6th, 1875.

Defendant's admissions of debt in preliminary examination do not conclude him under a subsequently amended answer from showing that the debt never in fact existed.

Introduction of individual's private books and papers by one side renders them competent as evidence for the other side.

Appeal from judgment recovered upon a referee's report.

Complaint, Money lent.

Answer, General denial (and payment.)

This action was brought to recover a balance of \$10,000 on two loans of \$20,000 and \$11,000, which plaintiff claims to have made to defendant.

Defendant plead payment in full, but afterward amending his answer by consent, plead,

1. General denial.

2. That "defendant had paid and discharged the indebtedness alleged in the complaint," and that plaintiff has received full satisfaction of all the loans and causes of action alleged.

Under the first answer a preliminary

examination of defendant was had, in which he admitted the loan from plaintiff, but claimed and sought to show that it had been paid.

The cause was thereafter referred to Hon. Wm. Mitchell, Esq., to hear and decide.

It appeared on the hearing that large sums of money had been lent to defendant and to his son, both by the plaintiff and by its president, Mr. Marsh, individually, (who since said loans and prior to this action had died) and at various times payment had been made upon some or all of these loans by defendant or his son, or both.

But as to the origin of the loan, to whom, and by whom these payments had been made, the evidence was very conflicting.

Plaintiff introduced the deposition taken on the preliminary examination as a written admission of the loan by it; and claimed that the \$20,000 was part of a loan formerly made to the Erie R. R. Co., some of which that company had paid back, and that a balance of \$20,000 had been transferred to defendant (a former director).

This defendant denied, and asserted that the \$20,000 had been loaned to him by Mr. Marsh, the president, individually, and not by plaintiff, and offered to prove this by Mr. Marsh's private check-book and returned checks, and that the same had been paid.

This offer of defendant was refused by the referee, although plaintiff had introduced in the case a part of Mr. Marsh's private books, &c.

The referee reported for plaintiff.

D. B. Eaton for resp't.

C. E. Tracy for appl't.

On appeal.

Held, That defendant was not concluded by anything that he had previously testified to, or that appeared on the trial, from claiming and proving, if possible, that the \$20,000 in suit had, in

fact, been loaned by Mr. Marsh and not by plaintiff. If the proof offered had been received and had been sufficient, that fact would have been established, and the plaintiff in that event prevented from recovering. Mr. Marsh's books had already been introduced in the case, and were competent for defendant's purpose. The proof was admissible under the amended answer, and should have been received. Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.* concurring.

EXECUTORS AND ADMINISTRATORS. DEMURRER.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT.

Michael H. Cashman, ex'or, &c., *appt.*
vs. Fernando Wood, *respt.*

Decided January 28, 1876.

An executor cannot recover an award for land of the testator taken for public purposes unless it appears by the will that such executor had some right to the possession of the land, either as trustee under the will or for purposes of administration.

In the absence of such allegations in the complaint, the complaint is demurrable for the reason that the land, or money awarded for it, is vested in the heirs at law of the testator.

Appeal from order of the Special Term sustaining demurrer to the complaint.

The complaint sets forth the following facts :

That Daniel Cashman departed this life seized of certain premises in the complaint described, leaving a will by which plaintiff with others was appointed executor. Such will gave power to his executors to sell and convey any and all of his real estate. That letters testamentary were issued to plaintiff, who was the only executor who qualified.

That prior to the commencement of

this action, The Mayor, &c., of New York City, under certain statutes took private property, located in New York City for the purpose of making, keeping and maintaining a public park, to be known as Riverside Park.

That in the proceedings instituted for such purpose, the commissioners appointed to make awards for the property so taken as aforesaid, awarded to unknown owners for a plot of land owned jointly by plaintiff's testator and the defendant \$——. That such money awarded as aforesaid was directed by the court to be deposited with the Chamberlain of the City of New York, and that upon the petition of the defendant an order was made March 8th, 1873, directing said money to be paid by the Chamberlain of the city of New York, to the defendant, which order was obeyed, and that on the 19th day of November, 1873, leave was granted to this plaintiff, to sue for the whole, or a portion of the award aforesaid.

The grounds of the demurrer interposed to the complaint were that the same did not constitute facts sufficient to constitute a cause of action, and that there was a defect of parties defendant.

A. C. & E. A. Ellis for *appt.*

Devlin, Miller and Trull for *respt.*

Held, That the plaintiff as executor could not maintain this action on the ground of the power of sale contained in the will. That to entitle the executor to recover the money, it must appear that he has some right to its possession, either for the purposes of administration or as a trustee under the will.

That the power of sale as stated in the complaint is a naked one; there are no allegations showing its objects or purposes, and none showing that any trust is created by the will, the proper execution of which would require that the fee of the land should be invested in the executor or trustee, nor are there any allegations showing that the proceeds of a sale by the executor are necessary for the purpose of

paying the debts of the testator in due course of administering his estate.

If the complaint contained proper allegations showing the necessity that the proceeds should come into his hands in his official character for the purpose of carrying out the trusts created by the will, or for the payment of debts in the course of its due execution, the executor under the provisions of the will permitting the sale of the testator's real estate, might have the right to the possession of the money. But on the allegations, as they now stand, we must hold that the title to the real estate, and, consequently, to the money awarded therefor, is vested in the heirs-at-law of the testator.

Order affirmed with \$10 costs, and with the usual leave for the plaintiff to amend upon payment of costs.

Opinion by *Davis, P. J.*; *Brady and Daniels, J. J.*, concurring.

FRAUD. MEASURE OF DAMAGE.
CONNECTICUT SUPREME COURT OF ERRORS.

Agnes Murray v. Nehemiah Jennings.

Decided at January Term, 1875.

In exchange of chattels, if one party makes false representations as to condition of his property, the other in action for fraud is entitled to recover damages, although he has received full value for his articles.

Measure of damage, the difference between actual value and value as represented.

A owned a pair of oxen worth \$100, which she exchanged with B for a horse which B represented to be perfectly sound, but which was foundered and liable at any time to become lame and unfit for use. If horse had been as represented by B it would have been worth at time of the exchange \$225, but on account of the unsoundness it was actually worth at the time of exchange only \$125.

There was no fraud of any kind on part of A in the transaction.

The oxen were immediately after butchered by B and the horse was not returned but retained by A. A brought suit against B for fraud. Defendant B claimed that plaintiff A was not entitled to recover, inasmuch as the oxen were not worth as much to him as the horse was *really* worth to plaintiff, and that therefore there was no damage to plaintiff.

Judgment in favor of plaintiff for \$100 and costs.

Held, 1. Plaintiff was entitled to recover of defendant, and that measure of damage is difference between the *actual* value of horse and what it would have been worth if as represented by defendant.

2. That the law gives the plaintiff the benefit of the contract, and places her with respect to it, and to all her rights under it, in the same position as if no fraud had been practiced upon her, and as if the horse was as sound and valuable as she had a right from defendant's representations to believe it was.

Opinion by Phelps, J.

GRAND LARCENY.

NEW YORK SUPREME COURT, GEN.
TERM., FIRST DEPT.

Abrams, plff. in error, v. The People,
defts. in error.

Decided January 28, 1876.

To constitute larceny there must be a felonious taking and carrying away of another's property.

Such taking involves trespass, or fraud, or device in getting possession.

Writ of error to the General Sessions.

The firm of W. C. Browning & Co. had employed Abrams for several years, to manufacture clothing for them. As had been their former custom, they sent him, in May, 1875, the material for making up 138 cassimere coats. He made up the coats as directed. He was thereafter in-

duced, by the persuasions of a peddler, to sell them to him for \$400. Of this he paid \$300 to the workmen, and with the residue left for California, and was there arrested.

There was no evidence tending to show that he intended to steal or convert these goods when he received them, or that he had obtained the possession of them by any trick or artifice. At the close of the testimony, prisoner's counsel requested the court to direct the jury to acquit the prisoner on the evidence, which was denied.

O. L. Stewart, for plttf. in error.

B. K. Phelps, for defts. in error.

On appeal, *Held*, That the only question for consideration is, whether an acquittal should not have been directed for want of satisfactory evidence to go to the jury, of intent to steal.

Both at common law and by the statutes, there must be a felonious taking to constitute larceny. It is defined by our statutes to be feloniously taking, and carrying away the personal property of another (2 R. S., Edm. Ed. 699, § 63), and such taking necessarily involves a trespass, or such fraud, or device in getting possession of the property, as shows that it was attained without the consent of its owners. But the evidence in this case showed the bailment of the property; that it was freely delivered to the prisoner without fraud on his part, for the purposes of the bailment; and as such bailee, he not only had the lawful possession of the property, but the lien which the law gives to such a bailee for the payment of the labor bestowed upon the article.

We think that the court ought to have instructed the jury that the evidence was not sufficient to justify a conviction of the crime of larceny.

Judgment reversed; new trial granted.

Opinion by *Davis, P. J.*; *Brady and Daniels, J. J.*, concurring.

N. Y. SUPREME COURT.—GENERAL TERM,
FIRST DEP'T.

Kelly, Plaintiff in error, v. *The People, Defendants in error*.

Decided January 28th, 1876.

Possession of property fraudulently obtained with felonious intent, title remaining in owner, is larceny.

Both possession and title so obtained is "obtaining money under false pretenses."

Error to General Sessions.

Complainant was met by *Kelly*, who professed to be a passenger on the steamer on which complainant worked, and asked complainant's assistance in getting some liquor aboard ship. When they reached the saloon *Kelly* borrowed of complainant \$50. to pay for the liquor, at the same time leaving with him, as security, five pieces of metal, which had the color, size, and appearance of \$20. gold pieces. *Kelly* told complainant to wait five minutes while he went into the saloon to get the liquor; then went into the saloon and slipped out at the back way with the money. The supposed coin turned out to be worthless. *Kelly* was convicted.

W. F. Kintzing for plaintiff in error.

B. K. Phelps for defendants in error.

On appeal,

Held. That there is no doubt but that the prisoner intended to defraud complainant of his property. But still he could not for that reason be indicted and convicted of a crime different from the one which he had committed. The bills were delivered with the owner's intention that they should become the property of the prisoner. Those bills were not to be returned, but the loan was to be repaid by bills of a like amount. The title passed from the owner with his consent, produced, it is true, by fraudulent representations. That did not constitute the crime of larceny, but of obtaining money under false pretenses. The distinction, though narrow, is still a material one.

When the possession of property is obtained by artifice, with felonious design, the title remaining unchanged in the owner, it is larceny; but if the owner is deceived by fraudulent representations into surrendering possession and title, it is not larceny, but false pretences (11 *N.Y. Sup. Ct. Repts.*, 511; 9 *Car. and P.* 741; 38 *Eng. C. L.* 429; 53 *N. Y.* 111).

According to these rules and authorities the prisoner could not be convicted of larceny. He should have been charged with obtaining money under false pretences, unless it could be shown that complainant did not intend that the prisoner should become the owner of the bills at the time when he received them.

He is not entitled, however, to be discharged, because he has been tried for an offense not committed by him; the case of *McCord v. People* (46 *N. Y.*, 470) secures him no such right. He should be kept in custody until a further trial of the present indictment can be had, or until an opportunity may be afforded of presenting the case to another grand jury, and he be placed on trial for obtaining money under false pretences.

The present judgment must however be reversed and a new trial ordered.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

JURISDICTION. FOREIGN JUDGMENT. PARTNERSHIP. APPEARANCE.

U. S. SUPREME COURT.

Hall and Lybrand, plffs. in error vs. Lanning et. al. defts., in error.

Decided October Term, 1875.

A judgment recovered against co-partners in one State cannot be enforced in another against a partner not personally served with process and not residing in the State where the judgment was obtained, though his co-partner, after dissolution, may have authorized an appearance by

attorney for the firm in the suit in which the judgment was recovered.

After the dissolution of a co-partnership, one of the partners in a suit brought against the firm has no authority to enter an appearance for the other partners who do not reside in the State where the suit is brought and have not been served with process.

In an action on a foreign judgment, the record of which discloses an appearance, it is competent for the defendant to show the appearance was unauthorized.

Error to U. S. Circuit Court, Northern District of Illinois.

An action of debt on a judgment rendered in New York against plaintiffs in error. Lybrand, pleaded separately *nul tiel record* and several special pleas questioning the validity of the judgment for want of jurisdiction over his person. The plaintiffs on the trial simply gave in evidence the record of the New York judgment, which showed that an attorney had appeared and answered for both defendants, who were sued as partners. The answer admitted the partnership, but set up various defences. A trial was had and judgment given for plaintiffs. This was the substance of the New York record. The plaintiff gave no further evidence. Lybrand then offered to prove that he, Lybrand, never was a resident, or citizen of the State of New York; and that he had not been within said State at any time since, nor for a long time before the commencement of the suit in which the judgment was rendered upon which the plaintiffs in this case brought suit; and that he never had any summons, process, notice, citation, or notice of any kind, either actual or constructive, ever given or served upon him; and that he never authorized any attorney or any other person to appear for him; and that no one ever had any authority to appear for him in said suit in the State of New York or to enter his appearance therein, nor did he ever authorize any one to em-

ploy an attorney to appear for him therein; and that he never entered his appearance therein in person; and that he knew nothing of the pendency thereof until the commencement of the present suit; and that said Lybrand was a partner in business with his co-defendant at the time the transaction occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved and due notice thereof published some six months prior to the commencement of said suit in New York.

This evidence being objected to was over-ruled by the court, which directed a verdict for plaintiffs.

Held, 1, That the jurisdiction of a foreign court over the person or the subject matter embraced in the judgment or decree of such court is always open to enquiry; that in this respect the court of another State is to be regarded as a foreign court; that the record of such a judgment does not estop the parties from demanding such an enquiry, and that, therefore, the rejection of defendant's offer was erroneous.—(*Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas Light Co.*, 19 Wall. 58.)

2. That a member of a partnership, residing in one State, cannot be rendered personally liable in a suit brought in another State, against him and his co-partners, although the latter be duly served with process, and although the law of the State where the suit is brought authorizes judgment to be rendered against him, and that his co-partners after dissolution cannot, without his authority, implicate him in suits brought against the firm by voluntarily entering an appearance for him.

3. That the relation of partnership does not confer upon each of the partners authority, after dissolution, to appear for his co-partners in a suit brought against the firm even in a domestic court where they are not served with process and have no notice of the suit.

The authority of a partner to enter an appearance for his co-partners, even during the continuance of the firm, is questionable. The assertion of such an authority in *Gow on Partnshp.*, p. 163; *Collyer on Partnshp.*, § 441; *Parsons on Partnshp.*, 174; note commented upon and doubted.

But domestic judgments, where they are sought to be enforced in their own State, stand upon a different footing from foreign judgments. If regular upon their face, and an appearance has been duly entered for the defendant by a responsible attorney, though no process has been served, and no appearance authorized, they will not necessarily be set aside. In any other State, however, the facts could be shown, notwithstanding the recitals of the record, and the judgment would be regarded as null and void for want of jurisdiction of the person.

Judgment reversed.

Opinion by *Bradley, J.*

MISTAKE.

N. Y. SUPREME COURT, GENL. TERM,
FIRST DEPT.

In the matter of the application of Mary Elizabeth Jackson, an infant, for leave to sell her real estate.

Decided January 28, 1876.

The findings of a referee in proceedings for the sale of infant's land are representations to a purchaser upon which he may rely.

An act done or a contract made under a mutual mistake or ignorance of a material fact, is voidable and relievable in equity.

Rule applied to a peculiar case.

Appeal by Henry S. Hewson from an order denying his application for compensation for a partial failure of title to land purchased by him in these proceedings.

The petition of Henry S. Hewson showed the following facts: That in the year

1869, an application was made by Mary Elizabeth Jackson, an infant, through her next friend, for leave to sell her real estate. The petition showed that said infant, as grand-daughter and heir-at-law of one Lewis Jackson, was owner of an undivided half of certain property located in 53d street, New York City, that such land was unproductive and that it was for the interest of the infant that the land should be sold for the benefit of such infant. One Townshend was appointed special guardian for such infant, and the matter was referred to a referee to take proof of the facts set forth in such petition and report to the court. Proofs were taken by the referee, who reported that the facts stated in the petition were true that Mary Elizabeth Jackson, as heir-at-law of Lewis Jackson, was the owner in fee of an undivided one-half of the property described in the petition, and that it was for the interest of the infant that the land be sold, &c. On the coming in and confirmation of the report of the referee, the special guardian was authorized to enter into a contract for the sale of the right of the infant in the premises, which such guardian afterwards did, and upon his report T., the guardian, was directed to convey the interest of the infant in the premises to Henry S. Hewson. Such conveyance was made and the purchase-money, \$3,500, paid to the special guardian by the purchaser. After the subsequent conveyance by Hewson the purchaser, by full covenant warranty deeds of this property and after the conveyance of same premises by Hewson's grantee, an action of ejectment was brought by one Georgianna L. Jones, by which it was adjudged that she, as only child of Geo. L. Jackson, son of Lewis Jackson deceased, was entitled to an undivided third of the premises aforesaid, purchased by Hewson as aforesaid. Upon such adjudication Henry S. Hewson, the petitioner herein, makes this application that the difference in the purchase price be-

tween the one-half which Hewson supposed he was buying and the one-third which he actually bought, to-wit, the sum of \$11,166.66, be refunded to him.

Upon the foregoing facts appearing, the application to have the money refunded was denied and this appeal taken.

S. V. R. Cooper, for appellt.

John Townshend, Guardian in person.

Held, That the fact found by the referee in the proceedings to sell, with reference to the interest of the infant, was equivalent to a representation to whoever might become the purchaser in the proceedings that the interest proposed to be sold was an undivided half of the land, subject to the widow's estate in dower. The sale of the infant's interest is made with the understanding that such interest has been accurately ascertained by the report of the referee, and upon that basis the purchaser buys.

That in this case the purchaser relying upon the representation in the petition and report aforesaid, as well as the other parties to the proceeding, were involved in a mutual and material mistake, by which the purchaser was led to pay at the sale one-third more than he otherwise would have paid. The general rule of equity applicable in such cases is, "That an act done or contract made under a mutual mistake, or ignorance of a material fact, is voidable and relievable in equity." And if one of the parties innocently misrepresents a material fact by mistake it is equally conclusive, for it operates as a surprise and imposition upon the other party.—(1 Storys. Eq. Pr., 11th Ed., §§ 140, 147, 193 and 994 and cases cited.)

In *Carr v. Carr* 3 Simons 447, such relief as is sought by the present application was granted.

The order made should be reversed and an order entered confirming the referee's report and directing the amount found to be equitably due to the purchaser, to-wit, \$11,166.66, be reimbursed to him with in

terest without costs under the circumstances.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

MORTGAGE. LIEN. PRIORITY.

CONNECTICUT SUPREME COURT OF ERRORS.

Middletown Savings Bank v. Fellowes.

Decided February, 1875.

A mortgage given upon the acquisition of title has precedence of a mechanic's lien, acquired by reason of labor on, and materials furnished to the premises under a contract with the mortgagor, who at the time the labor and materials were furnished had a contract for, but no title to, the premises.

Whether bringing materials upon the premises, and building a fence around the lot would be sufficient to establish a lien, quære.

The work done having far exceeded the price agreed upon at the time of the taking of the mortgage, whether, if the builder's lien had had precedence, it could have covered more than work agreed upon, quære.

Bill to foreclose a mortgage.

S., the owner of a house and lot, contracted to sell it to B., who thereafter contracted to sell it to F.

While S. still held the title and possession, F. employed a builder to make extensive repairs and improvements on the place. The builder, by permission of S., went upon the premises and commenced work.

About three weeks later, S., B. and F. met, and S. made a deed directly to F., who at the same time and as a part of the transaction, made a mortgage to the plaintiff for money actually loaned, the plaintiff having no knowledge of the builder's lien, and the mortgage being made under a previous agreement of F. to make it on acquiring title. At the time of the conveyance and mortgage, the work done by

the builder consisted only in having built a fence around the lot and furnishing some lumber which lay upon the premises, amounting in all to about \$800; but he afterwards proceeded with his contract, and finally acquired a lien for many thousands of dollars.

The work was done under an oral contract with F., made prior to the acquisition of the title by him, but through changes and from various other causes, the completed work very largely exceeded the amount originally contemplated by both parties.

Held, That the mortgage lien was entitled to priority. It is well settled in Connecticut that the land records should show the title to real estate; this is a wise and salutary policy to be enforced, unless there are controlling reasons to the contrary; that the plaintiff stands substantially as though the mortgage had been given it by S. The acquisition of the title, legal and equitable, to the premises, by F., and his mortgage of the same in fee to plaintiff, was all one transaction, so that if the builder had, prior thereto, furnished materials or had done work which would entitle him to a lien, there was no point of time in which that lien could slip in and take precedence of the mortgage. No work having been done upon the buildings, but only on the fence around the lot, there are serious doubts, to say the least, whether that furnished grounds for a lien.

The amount actually expended in work and materials was largely in excess of what either party anticipated at the commencement. It is by no means certain that, had the original understanding as to the amount of expenditure, been carried out, the property would not have been ample to pay both these encumbrances. Whether or not the mechanic's lien could, equitably, be thus increased to the prejudice of the mortgagees; *quære?*

Judgment for plaintiff.

Opinion by *Foster, J.*

PARTIES. DEMURRER.

N. Y. COURT OF APPEALS.

Haines, *et al*, *respt.* vs. Hollister, adm'r's, &c., *et al*, *appls.*

Decided January 18, 1876.

In the action against a firm of which one of the partners is dead, the administratrix of the deceased partner is a proper party defendant.

So also is the assignee of the firm where an accounting is prayed for.

A demurrer on the ground of a defect of parties will lie only where the defect is apparent; otherwise the objection must be taken by answer.

This action was brought to recover a balance due on two promissory notes given by a firm of which defendant's intestate was a member. The firm having become insolvent an assignment was made, with the consent of defendant's intestate, to S., who it appears has never accounted. The members of the firm, the administratrix and the assignee were made parties defendant. Plaintiff claimed that the assignee should account, and asked for judgment for any balance remaining due after the accounting by the assignee against the surviving members of the firm, and against the administratrix of the deceased member, or for such other relief as might be equitable. Defendants demurred to the complaint on the ground of an improper joinder of causes of action.

W. F. Cogswell for applt.

Holmes & Fitts for respts.

Held, That there was no error in joining the administratrix of the deceased partner with the surviving members of the firm, 2 Den. 577; 16 Barb. 44; 43 N. Y., 68; 55 Id., 12. The assignee of the firm was also a proper party defendant.

It was also objected on the part of the assignee that the other creditors should have been made parties to the action. There is nothing in the complaint to show that there were other creditors.

Held, That this objection was not ten-

able, as any creditors of the assignee could compel an accounting.

To entitle a defendant to demur on the ground of a defect of parties, the defect must be apparent (Code § 144); if a defect not apparent actually exists the objection should be taken by answer (Code, § 147).

Also held, That the action being of an equitable nature all the defendants were proper parties, and had a right to be notified of the proceedings.

Judgment of General term, affirming order of Special term overruling demurrers, affirmed.

Opinion by Miller, J.

REDEMPTION. EJECTMENT.
WRIT OF POSSESSION.

N. Y. COURT OF APPEALS.

Witbeck, *applt*, v. Van Rensselaer, *et al.*, *respts.*

Decided January 25, 1876.

A command in a writ of possession to return it within sixty days is directory only. The office of the writ is to carry the judgment into effect and can be executed after the return day.

A failure to remove the personal property does not vitiate the execution of the writ, provided the possession is delivered.

A re-entry by the tenant will not enlarge the time for redemption.

This action was brought to redeem a farm held by plaintiff under one of the Van Rensselaer leases from a forfeiture under a condition of re-entry. It appeared that plaintiff refused to pay any rent, and on being sued in ejectment for non-payment of rent still refused to pay, and judgment of ejectment was entered against him in July, 1863. Plaintiff having refused to recognize the judgment, a writ of possession was issued to the sheriff January 17, 1867, returnable sixty days thereafter. On February 25, 1867, a stay of proceedings

was served by the tenant, which continued in force until April 30, 1867. It did not appear whether any steps had been taken towards the enforcement of the writ before the stay was served. The sheriff returned that on May 10, 1867, he put the defendant in possession. The tender of the rent in arrear was not made until Sept. 24, 1869, and on the day following this action was commenced. The plaintiff claimed that the writ of possession being returnable in sixty days, and having been issued Jany. 17, 1867, and not executed until May 10, 1867, that there could not be a valid execution of it after the return day.

R. A. Parmenter, for applt.

Samuel Hand, for respts.

Held, That the writ could be executed after the return day; that the land of which the writ directed possession to be delivered was bound by the judgment, and the office of the writ was simply to carry the judgment into effect with reference to that land; that the command to return the writ within sixty days was directory merely.

Such an execution is not analagous to an execution against personal property, but is more analagous to a proceeding to sell real estate under an execution, and may be taken after the return day of the writ.

Plaintiff also claimed that there was no actual execution of the writ May 10, 1867. The judge on the trial found as a fact that the execution was duly executed on that day by the sheriff, who assumed to deliver possession of the premises to the agent of the assignee of the plaintiff in the execution, he being then upon the premises. It appeared that the sheriff demanded possession of the occupant of the only part of the premises that were occupied, and threatened to remove him unless he consented to acknowledge himself as holding under the landlord, which he did in writing. The sheriff went upon the unoccupied portions of the farm and assumed to deliver possession to the agent.

Held, That the finding of the judge was sustained by the sheriff's return, and the

other facts proved upon the trial: that the agent was placed in actual possession of the farm, so far as possession thereof could be delivered; that although it was the sheriff's duty to remove from the premises the personal property, yet an omission to do so would not vitiate the execution of the writ, possession of the land having been delivered.

Also, *Held*, That the statute, providing that in such case, if the rents and costs shall remain unpaid for six months after the execution was executed, the lessee shall be barred of all relief (2 R. S., 506, § 34), began to run from the time of the delivery of possession, and that the time limited for redemption could not be enlarged by a subsequent re-entry of plaintiff. The time for redemption having expired the court had no discretion, but was bound upon the facts proved to dismiss the complaint.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Per curiam opinion.

REFERENCE.

SUPREME COURT—GENERAL TERM.

FIRST DEPT.

Elizabeth Harden, *applt.* v. Robert H. Corbett, *respt.*

Decided January 28, 1876.

The complaint is controlling in determining the nature of an action.

An order denying a motion to refer for want of power is appealable.

The character of an action on contract to recover money deposited with a person on his promise to return same when demanded is not changed by the allegation that the depositary misappropriated and converted the funds.

Appeal from an order denying motion for order of reference.

The complaint alleges that the plaintiff, at the solicitation of defendant, deposited with defendant, who is an attorney of this court, money and securities of the

alleged value and amount of one hundred and twelve thousand dollars. That plaintiff placed said money and securities in the hands of defendant as her attorney and agent, and that he promised to hold the same for her and pay over the same to her whenever demanded; and alleged that defendant converted the same to his own use.

The answer admits the receipt of upwards of \$103,000, and then alleges that the defendant paid out at plaintiff's request about \$61,000; that he lost \$20,000 in speculating in Pacific Mail for her account, and that she promised to pay him for services rendered the sum of \$100,000, and demands judgment by way of counter claim for upwards of \$70,000.

The motion was made on the pleadings, a bill of particulars and affidavit.

The Court at Special Term denied the motion on the ground that the action was one sounding in tort, and therefore could not be referred.

George L. Ingraham for applt.

Robert L. Sewell for respt.

Held, on appeal, that as to the character of the action the complaint is controlling. That the complaint shows a cause of action on contract for the recovery of money which the plaintiff alleges she placed in the hands of the defendant as her attorney and counsel, and for which she demands an accounting. She distinctly alleges that defendant received said moneys as her attorney, promised to hold same for her, pay over the same to her when demanded, and she alleges a breach of this agreement. It does not change the character of the action that she also alleges that the defendant has misapplied and appropriated the moneys to his own use. That is merely another form of alleging a breach of the contract. The authorities establish that on allegations such as are contained in this case the action must be considered as one upon contract. 44 N. Y. 63; 42 N. Y. 33; 53 N. Y. 305.

The Special Term having denied the motion on the ground of want of power the order was clearly appealable. Order below

reversed and motion for reference granted.

Opinion by *Davis, P. J.*; *Brady* and *Donohue, J.J.*, concurring.

SUPREME COURT—GENERAL TERM.

FIRST DEPT.

Elliot C. Cowden et al, respts, v. Alfred Teale, applt.

Decided January 28, 1876.

Where the accuracy of an account is brought in question the case is referable.

Appeal from order granting a reference.

Action brought for money advanced, commissions and charges in reference to goods sold by plaintiff for defendant on commission.

Defence, that the property was sold at improper times and for less than its value, counter claiming for the amount in which defendant was damaged. It was stipulated on the part of the defendant that if an order of reference should not be granted, "All the items in plaintiff's account for cash, and other items for charges of money advanced and other items, shall be admitted."

H. C. Southworth for applt.

John B. Taylor for respts.

Held, That to establish the counter claim defendant must show each sale improperly made.

This assails plaintiff's account, for though the advances and charges are admitted, the sales are questioned. The accuracy of the account is questioned, and each sale in the account is the subject of investigation.

Order affirmed.

Opinion by *Brady, J.*; *Daniels, J.*, and *Davis, P. J.*, concurring.

STATUTE OF FRAUDS.

N. Y. COURT OF APPEALS.

Brewster et al, *appls*, v. Taylor, *respt*.

Decided January 18, 1876.

To take a sale of personal property out of the statute there must be a payment or a delivery and acceptance of the article. Delivery without acceptance is not sufficient.

This action was brought to recover the price of a wagon alleged to have been sold and delivered to the defendant. The evidence showed that defendant contracted orally to purchase of plaintiffs a two-horse wagon, to which a pole belonging to defendant was to be fitted, and when completed directed it to be sent to the stable of one McD. Plaintiffs could not fit the pole to the wagon, and sent it to the stable without further authority from defendant, and without notice to him, where the wagon was soon after destroyed. No payment had been made by defendant, and there was no proof of an acceptance by him. At the close of plaintiffs' evidence defendant moved for the dismissal of the complaint on the ground that the transaction was void by the statute of frauds. The motion was granted and a verdict directed for defendant.

Samuel Hind for *appls*.

D. C. Brown for *respt*.

Held, No error, that the sale of the wagon was not complete until the pole had been fitted, and so there was no acceptance when the contract was made, and it was not established by sending the wagon to the stable. No sale therefore was made out within the statute of frauds.

Order of General Term reversing order of Special Term granting a new trial affirmed.

Opinion by *Miller, J.*

USURY. NATIONAL BANKS.
BANKS AND BANKING.

PHILADELPHIA COMMON PLEAS.

The First National Bank of Lebanon
v. Cake.

Decided December 31, 1875.

A bank is under no obligation to give an applicant for discount notice whether or not his paper will be taken. And it makes no difference that the discount was to be applied to the payment of notes then in the bank on which the applicant was an indorser.

The usurious interest taken by a National Bank in previous transactions only will be a matter of set-off.

The whole interest paid can be recovered only in an action as a penalty of debt.

Rule for a new trial.

Opinion by *Thayer, P. J.*

The action was upon two indorsements of the defendant, one of them being upon a draft of the Alaska Coal Company for \$3,150, to the order of Simon J. Stine, and the other upon a note of Stine for \$650. These instruments were discounted by the plaintiffs for Stine, and were both protested for non-payment. Subsequently Stine sent to the bank, by mail, two other notes to be discounted, in order that with the proceeds he might take up the protested draft and note. The bank refused to discount the two notes sent for this purpose. The first point of the defence was that the bank ought to have notified the defendant of their refusal to discount the second set of notes for Stine and that by its neglect to do so he lost the opportunity of securing himself by proceeding promptly against Stine. It is difficult to comprehend how any obligation rested upon the bank to notify the defendant of their refusal to discount the second set of notes sent to them by Stine, or to accept them in renewal of the protested paper. It was the defendant's duty to ascertain himself whether the bank would

accept any such offer made by Stine to extend further indulgence to him and his indorser, the defendant. There is no ground whatever, either of reason or of law, for asserting that any duty rested upon the bank to notify the defendant of their refusal to extend further accommodation to Stine. It was a fact which he could have easily ascertained upon inquiry at the bank, and if it was important for him to know it, it was his own fault that he did not ask for the information himself.

The second branch of the defence rested upon the allegation that the bank had discounted the paper upon which suit was brought, and other notes upon former occasions out of which the paper sued upon had arisen, at usurious rates. Upon that subject the jury were instructed by the court, that by the act of Congress relating to the organization of National Banks, the taking of usurious interest upon the instruments sued upon would work a forfeiture of all interest due upon them, the legal interest as well as the usurious interest, and, that if they found that the paper in suit had been discounted at usurious rates, the plaintiffs could recover no interest whatever. With regard to the prior notes which the bank had previously discounted for Stine upon former occasions the jury were told that if they found that the bank had received any usurious interest in those transactions, they should deduct the usurious interest so received from the plaintiff's claim, but not the lawful interest paid; but that the lawful interest paid in those prior transactions was not to be deducted from the plaintiff's claim in this suit, but if the parties desired to make any further reclamations against the bank, upon their former transactions, other than the deduction of the usurious interest, they must proceed for the penalty in an action of debt, in which they might recover double the amount of the interest taken, according to the statute.

This ruling was in conformity with *Brown v. The Second National Bank of Erie* (22 Smith, 209); and *Lucas v. The National Bank of Pottsville* (32 Legal Int. 379), as we understand those decisions.

Rule discharged.

WAGERING. CHECK GIVEN FOR SHARE OF WINNINGS.

ENGLISH DECISIONS. EXCHEQUER DIVISION.

Beeston v. Beeston.

Decided November 22, 1875.

A contract whereby one party agrees to advance money to another with which to bet or wager, the proceeds of which are to be divided, is not illegal, and the latter will be compelled to account to the former in respect of money earned thereunder.

Declaration on check drawn by defendant to plaintiff's order.

Plea, That plaintiff and defendant entered into a contract whereby plaintiff was to advance certain moneys; and, with such moneys, and his own, defendant was to bet and wager upon the result of certain horse races, the proceeds of which were to be divided in certain proportions, and that the check was given for plaintiff's share of moneys won on such races and for no other consideration.

Demurrer and joinder.

Held, The statute (8 and 9 Vic. c., 109 s. 18) is directed against suits brought for recovering on any contract by way of wagering, and applies to actions brought by one party to a wager against the other, or by either party against a stakeholder.

This case is not within the statute.

The only thing that can be said on the other side is, that this being a pre-arranged plan, such betting as was in contemplation was illegal, but it was not so at common law, and the statute applies only to securities between the parties wagering. It only makes such contracts null and void, not illegal.

Judgment for plaintiff.

Opinion by *Pollock, B.*

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ADMINISTRATOR.

N. Y. SUPREME COURT, FIRST DEPARTMENT.

Harvey, admr, &c., applt., vs. Burnham, resp't.

Decided December 30, 1875.

*In absence of proof to the contrary, administrator presumed to have paid only such debts as were properly proved.**Special administrators appointed in another state, should contest claims of creditors being in that state, and not the general administrator here.**Release of a security does not affect the indebtedness it was given to secure.*

Appeal from order of the Surrogate's Court directing the payment by the administrator of the amount of a note held by respondent.

As security for a promissory note held by respondent, deceased had executed a mortgage of certain of his real estate in Connecticut, and given it to respondent. This lien upon this property respondent released, and permitted the special administrator appointed in that State to sell the land and apply all the proceeds of such sale to the payment of creditors residing there, under authority from the Connecticut Court of Probate. Respondent then looked to the appellant for the payment of his claim.

The existence of the debt is not disputed, but appellant urged in his affidavit that the release was made without his knowledge, and that certain unjust and disputed claims of respondent's son-in-law were thereby paid, which otherwise could have been resisted. That respondent had conspired with his son-in-law to effect this result, and had thereby damaged the appellant to the extent of \$500.

These charges were not sustained by any further proof than the mere statements of appellant in his affidavits.

*White & Bushe, for applt.**W. S. Logan, for resp't.**Held, on appeal, That the money received by the sale of the mortgaged property in Connecticut, seems to have been applied by the special administrator, in due course of administration, to the payment of debts in that state, under proper authority.*

In the absence of proof to the contrary we must presume that the debts paid were only those which had been properly proved. This, however, is not the place to contest these payments. That should have been done by the special administrator in Connecticut, and his failure to have done so cannot now be urged as a reason for not paying the debt of respondent.

The release of respondent's mortgage would not, in itself, have any effect upon the indebtedness which it had been given to secure.

Order affirmed.

Opinion by Davis, P. J.; Daniels, J., concurring.

ASSESSMENTS. LOCAL IMPROVEMENTS.

N. Y. COURT OF APPEALS.

Mayer, resp't, v. The Mayor, etc., of N. Y., applt.

Decided December 21, 1875.

*Where money has been paid under a mistake of fact, although the party paying it was guilty of negligence, he may recover it, unless the position of the party receiving it has been changed in consequence thereof.**Local improvements instituted by the corporation are public improvements, and the moneys collected therefor are held by the city in its own right, and not as depository.*

This action was brought to recover back money paid to defendant by plaintiff for an assessment for a local improvement upon land in New York city. In making the payment plaintiff intended to

pay for the assessment on his own lot, but by mistake paid for that on the lot adjoining. It did not appear that the assessment was cancelled of record, or that when the mistake was discovered and payment demanded it could not have been collected of the person liable, or by sale of the premises.

D. J. Dean, for appl'ts.

Wm. C. Whitney, for resp't.

Held, That plaintiff was entitled to recover back the money paid to him. Where money has been paid under a mistake of a material fact, although there was negligence on the part of the person paying it, it can be recovered back, unless the position of the party receiving the payment has been changed in consequence of it. In that case the person who made the payment must bear the loss occasioned by his negligence. If circumstances exist which take the case out of the general rule the burden of proving them rests upon the party resisting the repayment (43 N. Y. 452; 46 id., 685; 54 id., 432; 55 id., 211).

The defendant claimed that the money collected on local assessment is not for the benefit of the city; and that the city acts in making local improvements for the benefit and in behalf of the owners of the property assessed.

Held, That the improvements spoken of as local are instituted by the corporation and are public improvements as strictly as any other improvements undertaken by it; that the city receives the money collected through a local assessment in its own right and not as agent or depository.

Judgment of General Term affirming judgment for plaintiff affirmed.

Opinion by *Andrews, J.*

COMMON CARRIER. LIABILITY WHERE GOODS ARE SEIZED BY LEGAL PROCESS.

SUPREME COURT OF INDIANA.

O. & M. R. R. Co. v. Yohe et al.

Decided January Term, 1876.

A common carrier is not liable for the non-delivery of goods taken from his possession by legal process, without any act, fault, or connivance on his part.

Nor is he bound to follow them up on behalf of the party for whom he undertook to carry them. But he must give prompt notice that the goods have been seized and taken from his possession.

Appeal from Martin Circuit.

The complaint alleged that appellant undertook to carry a quantity of wheat from Bridgeport, Illinois, to Vincennes, Indiana, and a failure to deliver.

The appellant pleaded, in substance, that while the wheat was in a car of the company at Bridgeport awaiting the coming of a train to transport it to Vincennes, without any act, fault, or connivance of defendant or its servants or agents, one Johnson sued out of the Circuit Court of Lawrence County, Illinois, a writ of replevin by virtue of which the Sheriff seized the wheat and took it out of possession of defendant and still retains it, by reason whereof the defendant was prevented from transporting or delivering it. It was averred that the Lawrence Circuit had jurisdiction.

A demurrer to the answer, on the ground it did not state facts sufficient to constitute a defense, was filed by plaintiffs and sustained by the Court. Defendant declining to answer further, there was judgment for plaintiffs.

Held, 1. It is impossible for the carrier to deliver the goods to the consignee when they have been seized by legal process and taken out of his possession; the form of the process is immaterial, as in any case the carrier must yield to the authority of legal process. After the seizure of the goods by the officer, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of law. The right of the officer to hold the goods involved questions which could only be determined by the tribunal which issued the process, and

the carrier had no power to decide them. It makes no difference that the process was issued in a State different from that in which the plaintiffs reside. The carrier must obey the laws of the various States in which he follows his calling.

The carrier is deprived of the possession of the property by a superior power—the power of the State—the *vis major* of the civil law—and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the “act of God,” or the “public enemy.”

2. The carrier cannot stop, when goods are offered him for carriage, to investigate the question of their ownership, nor is he bound, when the goods are so taken out of his possession to follow them up, and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them.

3. That the carrier should have given prompt notice to the plaintiffs of the seizure; that if negligent in this respect he will be liable.

The answer not averring the giving of this notice, is bad.

Judgment affirmed.

Opinion by *Dowrey, J.*

CONTRACT.

N. Y. COURT OF APPEALS.

Adams, applt v. Loes et al. respts.

Decided Dec. 21st, 1875.

When Commissioners advertise for proposals for doing certain work, and party offers, in writing, to do it at prices named, and proposes names of two sureties, and offer and proposals are acceded to, and afterwards one of the sureties refuses to qualify, and another is offered and refused, the agreement is still “in fieri,” and no action can be maintained to consummate the agreement or to recover. The parties are not obliged to accept any sureties but those first proposed. Public officers are to consider character, &c., as well as pecuniary responsibility, in accepting sureties.

This action was brought against de-

fendants, who were highway commissioners, in their official capacity, to compel them to enter into a contract with plaintiff, and to restrain them from contracting with another. The complaint also asked damages against them as individuals for a refusal to consummate an alleged agreement. It appeared that plaintiff, in compliance with a public notice of defendants, as commissioners, asking for proposals for doing certain work of which they had charge, made a written offer to do the work at prices named, and proposed the names of the two sureties for the performance of his contract. This offer and proposal were acceded to by the defendants, and they were ready to consummate the contract, which was to be in writing, in accordance with its terms. One of the sureties proposed by plaintiff refused to qualify, and for this reason the contract was not consummated. Defendants gave plaintiff time and notified him that a surety, proposed by him as a substitute, would not be accepted, and plaintiff made no farther effort to get the surety first proposed to reconsider his refusal to qualify or to secure one who would be satisfactory.

Adams & Swan, for applt.

C. J. Lowrey, for respts.

Held, That plaintiff could not recover; that he could not maintain an action, as the minds of the parties had not met in a perfected agreement; that until the agreement had been reduced to writing and signed by the parties the agreement was still *in fieri*.

Defendants were not obliged to accept any sureties but those proposed.

Hicks v. Whitmore, 12 Wend, 548; *Mills v. Hunt*, 30 id., 431, distinguished.

Public officers, in determining whether a proposed surety is a proper person to be accepted, may consider other things besides his present reputed or actual pecuniary responsibility; his residence, vocation, business, business habits, the character of his investments and property, his character for integrity and prudence may

properly influence their judgment.

As to whether such an action as this can be maintained against such public officers *quære*.

Judgment of General Term affirming judgment dismissing complaint, affirmed.

Opinion by *Allen, J.*

DEED. ASSESSMENT ROLL.

N. Y. COURT OF APPEALS.

Barlow, et al., resp't, v. The St. Nicholas National Bank of N. Y., appl't.

Decided December 14, 1875.

A covenant against incumbrances, in a deed, is a covenant, in presenti, and there can be no breach unless an action thereon would lie at once.

The entry of the land in the assessment roll is not an imposition of a charge upon the land.

This action was brought for a breach of a covenant in a deed. On the 27th day of October, 1868, defendant conveyed to the plaintiff a farm, by deed, containing a covenant that the premises "are free and clear from all incumbrances whatsoever."

Defendant had owned the farm for a year previous. The assessors of the town in which the farm was situated had assessed it in June of that year to one E., the occupant, and completed their assessment roll in August thereafter, as required by law, and delivered it to the Board of Supervisors of the County, at their annual meeting, held November 9, 1868, and the Board of Supervisors, pursuant to law, extended the taxes thereon and delivered it with their warrant to the collector of the town. The tax on the roll was entered against E., and with the collector's fees was paid by the plaintiffs, who have demanded back the sum paid by them of the defendant, which demand has been refused.

Edward H. Hawkins, for appl't.

Francis Larkin, for resp't.

Held, That the covenant upon which this action was brought was a covenant in *pre-*

*sent*i, and, if broken at all, was broken as soon as the deed was executed (4 Kent Com. 471; Rawle on Cov. of Title 89; 26 N. Y., 495); and unless an action would lie at once there is no breach of the covenant; that no lien or incumbrance on the lands was created by the entry of the land in the assessment roll of the assessors; that the assessment roll is the basis upon which the Board of Supervisors acts in apportioning the tax; but it is in no sense the imposition of a charge upon the land, and the assessment roll not having been acted upon by the Board of Supervisors, and the tax imposed until after the land had been conveyed to the plaintiffs, they could not recover (*Rundell v. Lakey*, 40 N. Y. 513, distinguished).

It would be an unwarrantable extension of the ordinary and natural meaning of the general covenant against incumbrances to hold that it applies to a tax levied after the covenant was made.

Order of General Term reversing judgment for defendant entered on report of referee reversed, and judgment affirmed.

Opinion by *Andrews, J.*

DEMAND.

SUPREME COURT. GEN. TERM., FIRST DEPT.

Simeon Salmon, resp., agst. Marcus Van Praag, appl't.

Decided Jan. 28th, 1876.

In an action to recover personal property, no demand is necessary of a defendant who wrongfully detains the property, not being a bona fide purchaser.

The refusal of a judge to allow a witness to be sworn after the case has been closed, is not reviewable on appeal.

Where there are slight circumstances tending to establish the bad faith of a purchase, it cannot be said by an Appellate Court that it was not sufficient for the purpose.

Appeal from a judgment recovered against defendant and appellant.

This was an action brought to recover the possession of personal property.

The complaint alleges that plaintiff, being induced by false and fraudulent representations, and relying upon same, sold and delivered to one Prowler a quantity of tobacco. That Prowler transferred same to defendant, who wrongfully detains same.

Answer substantially, a general denial.

No demand by plaintiff from defendant for the return of the goods previous to the commencement of the action was shown.

After the case had been closed and summed up, the defendants requested the privilege of calling Prowler as a witness, which request was denied. It was urged on appeal that there was no evidence to support the finding of the jury, that defendant was not a *bona fide* purchaser; that the judge erred in refusing to direct a judgment for the defendant, no demand having been shown that a new trial should be granted by reason of the judge's refusal to permit Prowler to be sworn after case was closed.

Lewis Saunders, defts. atty.

Thomas Darlington, plffs. atty.

Held, on appeal, That in case the defendant was not a *bona fide* holder, no demand before suit was necessary, and by the finding of the jury the character of defendant's title is declared and no demand was necessary. That the refusal of the judge to allow Prowler to be sworn was entirely in the discretion of the judge and not reviewable by this court, and, further, that although the evidence tending to show the defendant was not a *bona fide* purchaser was very slight, there were circumstances tending to establish the bad faith of the purchase, and it cannot be said by an Appellate Court that it was not sufficient for the purpose. It is impossible for Appellate Courts to reproduce the trial as it occurred. The jury have the advantage of seeing and hearing the witnesses, and are best able to judge of

the weight to be given to the testimony. Judgment affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

EQUITABLE MORTGAGE

PHILADELPHIA COMMON PLEAS.

Sidney v. Stevenson.

Decided January 29th, 1876.

In Pennsylvania an equitable mortgage cannot be created by a deposit of title deeds, but a Court of Equity will not enforce their return until the party depositing them has complied with the agreement under which they are held.

Bill filed by plaintiff praying that defendant be compelled to surrender a deed for a tract of land, of which plaintiff is owner.

It sets up that the deed was left with defendant, until such time as plaintiff should demand it, a demand and refusal.

The answer sets up that the deed was left with defendant upon an agreement that he should hold it until plaintiff repaid certain loans made him by defendant, and that the money loaned had not been returned.

To this answer no reply is made, nor is the truthfulness of its averments in any way questioned.

Held, The prayer of the bill is sought to be enforced upon the ground, that admitting the truth of the case made by the defendant, the contract is, at most, an attempt to maintain an equitable mortgage by a deposit of the deeds as a security for money loaned, which cannot be done. *Bowers v. Oyster*, 3 Penna., 239, decides that there can be no such thing as a valid and efficacious parol mortgage in Pennsylvania; first, because it is contrary to the statute of frauds and perjuries, and second, the recording acts and the act prescribing the mode of proceeding to enforce payment of debts due upon mortgage stand in the way of giving effect to a parol mortgage. A contrary doctrine had been

taken for granted in the case of *Reikert v. Madeira*, 1 Rawle, 325; *Shietz v. Deifenbach*, 3 Barr, 233, reaffirms the doctrine of *Bowers v. Oyster*.

This case gives rise to no such question. The defendant does not claim that the deposit of title deeds with him, to be held until the money loaned to the plaintiff is repaid, in any proper sense constitutes him a mortgagee of the premises; nor has he in any way sought to enforce his claim as a valid claim against the land.

The single question is, can the plaintiff successfully invoke the aid of a Court of Equity to enforce the return of his deed, before he has complied with his agreement with the defendant. The familiar principle, that every one must come into equity with clean hands, applies here with all its force; no man being entitled to claim to have equity awarded to him who is not himself ready to do equity, and who does not proffer to do it. It is clearly contrary to that which is conscientious and just to aid a party to violate his own agreement, whereby he has taken an advantage, and, in this case, a large pecuniary advantage, to himself. The deed in question was deposited with the defendant, to hold until the plaintiff would comply with his obligation to repay the money, which had been loaned on the faith of this deposit of the deed, and the promise of repayment. There has been no repayment, nor an offer to repay. The plaintiff must, therefore, be left to seek whatever legal right he may have, having no standing in a Court of Equity.

Bill dismissed.

Opinion by *Allison, P. J.*

**FRAUD. INNOCENT PARTY.
PHILADELPHIA. COMMON PLEAS.**

Aull et al. vs. Colket et al.

Decided January 29th, 1876.

Where one or two innocent persons must suffer by the fraud of a third,

whichever has accredited him must bear the loss.

Sur rule for new trial.

Action to recover from defendants who were stock brokers, the value of 300 shares of the stock of the Pacific Mail Steamship Company, which had been sold and negotiated with them by one Charles A. Harte, a clerk or book-keeper in the employ of the plaintiffs. Harte had gained the confidence of the plaintiffs, and by means thereof had access to their box in the vault of the Central Bank, from which he stole the certificates of the said stock, and without plaintiffs' knowledge parted with them to the defendants.

Upon the trial the plaintiffs proved their property, the theft of Harte, and the conversion of the securities by defendants.

Upon the part of the defendants it was mainly contended, that the certificates as made and endorsed, were negotiable instruments, made so by the customs of their peculiar business.

They were made and endorsed as follows:

No. 51694. (Vignette.) 100 shares.
PACIFIC MAIL STEAMSHIP COMPANY, }
New York, Oct. 15, 1872. }

Be it known that Joseph J. Lawrence is entitled to one hundred shares of one hundred dollars each in the Capital Stock of the Pacific Mail Steamship Company, transferable only on the books of the Company by him or his attorney on surrender of this certificate.

P. MCG. BELLOWES,
Vice-President.

THEO. T. JOHNSON,
Secretary.

(Written in red ink, across left of face.)
Registered and countersigned this 15th day of October, 1872, one hundred shares.
U. S. Trust Company of New York.

W. DARROW SUTY,
Registrar of Transfers.

(Stamped in blue ink.)
Cancelled March 25, 1873.
(Endorsed on certificate.)

Know all men by these presents that for value received, I have, and by these presents do bargain, sell, assign, and transfer unto — shares of the Capital Stock of the Pacific Mail Steamship Company, standing in — name on the books of said Company (and represented by within certificate), and do hereby constitute and appoint — attorney, irrevocable, for — and in — name to transfer the said stock, with power, one or more attorneys, under — for the like purpose to make and substitute —.

Witness — hand and seal the 21st day of Oct., A. D. 1872.

* JOSEPH J. LAWRENCE.

In presence of

A. T. YEATES.

The jury were instructed that the certificates in evidence were not negotiable instruments by law, and that defendants acquired no title thereto. The verdict was accordingly in favor of plaintiffs for over \$30,000.

The defendants' counsel upon the trial, however, requested that the jury be instructed as follows:

"If the jury find that these certificates, with bills of sale and powers to transfer executed in blank, were pledged to the defendants for value and taken by them in good faith, and that the loss to the plaintiffs was the result of their own negligence in not filling up the blanks in the bills of sale and powers to transfer, with their own names, and of their misplaced confidence in the man who pledged them to the defendants, then this loss must be borne by the plaintiffs, who, by their negligence in not filling up the blanks, and by employing and trusting such persons with the certificates in such a condition enabled him to commit the fraud."

Held, Under the rule laid down in *Mundorff v. Wickersham*, 13 Smith, 87 "that where one or two innocent persons must suffer by the fraud or negligence of a third, whichever has accredited him must bear the loss;" this point, if made

out to the satisfaction of a jury, might determine the case. We cannot say that the case was so destitute of evidence that this should not have gone to the jury. It was taken from them and therefore without determining in any way the question as to the negotiability or transferability of the instruments, we see sufficient error to justify a new trial in so important a case, and the rule must accordingly be made absolute.

Rule absolute.

Opinion by *Elcock, J.*

INSURANCE.

N. Y. COURT OF APPEALS.

Bush, respt. v. Westchester Fire Ins. Co.

Decided January 18, 1876.

The authority of an agent to receive proposals for insurance and countersign and deliver policies, cannot be held to extend to adjusting losses or waiving proofs of loss, and binding the company to pay without them.

This action was brought upon a policy of insurance which provided, among other things, that the insured, in case of loss, was to immediately render a particular account thereof to the company, and when property should be damaged to forthwith cause it to be put in order, and furnish an inventory of the goods damaged to the company.

A loss having occurred, proofs of loss were forwarded to defendants, who afterwards notified plaintiff that they were not accepted on the ground that he had not complied with the conditions of the policy, as to giving a particular account of the loss to the company, and furnishing an inventory. It was conceded on the trial that this condition had not been complied with, but plaintiff claimed that it had been waived by the defendant. Plaintiff proved that immediately after the fire the agents of other companies, who had policies on the property, examined the stock and books, and estimated the damage, and agreed that the loss exceeded the amount

insured. That Straight, one of defendant's local agents, acted with them and concurred in their conclusion, and expressed himself satisfied that the loss was double the insurance. Defendant objected to all this evidence on the ground that Straight's authority was not proved. There was proof that Straight and his partner were local agents for issuing policies, but no proof that they had ever acted for defendant in adjusting losses or waiving conditions before the occasion in question, or that they were agents of defendant for any other purpose than as stated.

The judge charged the jury in substance that, so far as the local agents assumed to act for the defendant in waiving proofs of loss, plaintiff had a right to infer that they had authority to act. That if either of them said it was all right, and the loss would be paid that would be a waiver on the part of the defendant.

Jeremiah McGuire for resp'ts.

Rufus King for appl'ts.

Held, error. That the authority of an agent to receive proposals for insurance and countersign and deliver policies, cannot be held to extend to adjusting losses, or waiving the stipulated proofs of loss, and binding the company to pay without them. The mere fact that such an agent assumes in a particular case to do these acts, does not establish his authority.

Judgment of General Term, affirming judgment for plaintiff on verdict reversed and new trial ordered.

Opinion by *Rapallo, J.*

JOINT CONTRACT.

SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT.

Dennis, resp't, v. Charlick, Survivor, &c., appl't.

Decided December 6th, 1875.

Where one of two persons employs a third to act in the joint interests of the two, representing that he is authorized to bind the other, he is

liable individually to such third person.

Appeal from judgment entered upon the verdict of a jury.

Plaintiff was employed as a real estate broker by defendant, who acted for himself and one W., in whose behalf defendant declared himself authorized to act to find a purchaser for premises which belonged to them in common.

Plaintiff found such a purchaser, between whom and defendant, Charlick, an oral contract of sale was made, the terms of which were mutually agreed upon. Thereupon an attorney was employed who drew up a written contract in conformity with the agreement. The purchaser stood ready and willing to perform his part of the agreement, but it seems defendant was disinclined to sign the contract, and that the same was not consummated and eventually fell through.

For his commission in finding a purchaser plaintiff sues.

Defendant W. died pending the action.

The jury, under a charge presenting the question as to whether the contract was a joint one or not, and that unless it was plaintiff could not recover, found for plaintiff.

Luther R. Marsh, for resp't.

Beach & Brown, for appl't.

On appeal,

Held, The proof of the fact, as found by the jury, that Charlick was authorized by W. to act in his behalf is sufficient to establish as against Charlick the joint contract alleged.

But even if Charlick's representations as to authority were not such as that they would have bound W. had he been living; yet Charlick would have been so far bound by his representations as that a recovery could have been had against him. For if they had been untrue they would still doubtless be liable individually under sections 136 and 274 of the Code, since the jury found that they had in fact been made.

And the fact, as found by the jury, that under defendant's instruction plaintiff had brought a purchaser to him who was ready and willing to purchase, would entitle plaintiff to recover.

Judgment affirmed.

Opinion by *Davis, P. J.*; *Brady, J.*, and *Daniels, J.*, concurring.

JURISDICTION.

DECISION OF STATE COURT. WHEN NOT REVIEWABLE.

U. S. SUPREME COURT.

Long and Watson, plffs. in error, v. Converse, et al., defs. in error.

Decided October Term, 1875.

In an action for the recovery of property, it is not sufficient to give this Court jurisdiction to review, on a writ of error, the decision of the highest court of a state, that title in a third party, acquired under a United States statute, is set up to defeat the plaintiff's claim; the defendant himself must claim title under a statute (R. S., 709.)

Error to the Supreme Judicial Court of Massachusetts.

On August 2d, 1870, the defendants in error were appointed receivers of the B. H. & E. R. R. Co.

On the 1st of March, 1871, the Company was adjudged a bankrupt and an assignment covering all its property possessed on the 21st of October, 1870, was made, under the provisions of the bankrupt act, to assignees.

On the 20th of September, 1871, the defendants in error filed a bill in the Massachusetts Court against the plaintiffs in error, to recover certain bonds of the city of Providence, which, it was alleged, belonged to the R. R. Co., but which the Company had wrongfully transferred, through one of its officers, to the plaintiffs in error. The plaintiffs in error answered the petition, denying substantially all its allegations.

Subsequently, on the 27th of June, 1872, they filed an amendment to their

answer, setting up the bankruptcy of the Co., and the assignment to the assignees, and concluding as follows: "Wherefore these respondents submit that the said petitioners had not, at the date of the filing of the said petition, if they ever had, any right to the possession of any of the property of the said B. H. & E. R. R. Co.," and particularly to the property in question.

At the April Term, 1872, a decree was ordered in favor of the receivers, and the cause continued.

On the 28th of August, 1872, the assignees in bankruptcy, filed in the cause, a paper addressed to the court, in which they represented that, "having read the proposed decree against George W. Long and John C. Watson, ordering them to surrender and deliver up to the receivers the property described in the petition, we do assent to said decree," &c. On the 5th of May, 1873, a decree in form was entered, in which it was "found as a matter of fact, that * * * the right to the possession of and the title to the property mentioned are now in the petitioners, notwithstanding the amended answer of the said defendants, and the alleged adjudication in bankruptcy, and the subsequent assignment therein." Thereupon it was decreed that the receivers recover, &c., &c.

Held, Our jurisdiction in this case depends upon the effect to be given to that provision of the judiciary act (Rev. Stat., 709), which authorizes this court to re-examine the decisions of the highest court of a state in certain cases "where any title, right, privilege or immunity is claimed under" any statute of the United States.

That Long and Watson did not claim under the assignees in bankruptcy; that they set up the title of the assignees, not to protect their own, but to defeat that of the receivers; that they claimed adversely to both the receivers and the assignees, and that they, therefore, claimed no title

right, privilege or immunity under the bankrupt law.

Case dismissed for want of jurisdiction.

Opinion by *Chief Justice Waite*.

LEASE.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPT.

Isaac Dayton, Public Adm., &c., *respt.*,
agst John McCahill and Virginia P.
Kelly, Executrix, &c., *applt.*

December 30, 1875.

When one of joint lessees receives rents under the authority created by a lease, and upon the strength of the title of the lessees, he has no right to retain the money on the ground that the lease was a nullity.

The appeal in this case is from a judgment recovered in favor of the defendant, John McCahill, dismissing the plaintiff's complaint as to him without costs, and in favor of the plaintiff against Virginia P. Kelly, as executrix, for \$5,538.45 and costs, in an action for an accounting.

The complaint alleged that one William Smets, who died intestate, was the owner of one-fifth of the rents of certain leasehold property in East Broadway, in the city of New York, by reason of a one-fifth ownership in a certain lease dated , 1858, leasing said property to said Smets and others.

The answer is substantially a general denial on the part of defendant McCahill, and also on the part of the defendant Virginia P. Kelly, as executrix of Hugh Kelly, deceased, except that she, answering separately, admits the receipt by her of rents accruing from the property aforesaid.

The original lease of the premises was assigned in February, 1826, to Thomas Wymbs.

The term created by it expired on May 1st, 1837, but it contained a covenant for renewal. Thomas Wymbs died in 1830, having first made and published his will,

in and by which, after disposing of other portions of his property, he bequeathed and devised two seventh parts of the rents to his wife in lieu of dower, and the other five-sevenths to John T., Catherine, the wife of one Hugh Kelly, Mary Ann, Margaret and Josephine. Mary Ann married William A. Smets, who inherited the wife's interest in the leasehold property from her.

The lease of 1858 aforesaid, which was a renewal of a lease executed in 1837, provided that in case the parties to whom the term created by the lease was granted were not entitled to the renewal aforesaid, the same should be void.

The real grounds of defence of the action were that the plaintiff, as administrator of William Smets, was not entitled to any of the rents accruing upon the lease, for the reason that parties to the lease of 1858 were not the parties entitled to renew the prior lease.

Moses Ely for *applt.*

Thomas Brackenfon for *respts.*

Held. The executrix seems to have collected and received the rents under the authority created by the lease, and upon the strength of the title of the lessees named in it. After going so far as to recover the money in that way it would be difficult to advance any well grounded theory which would justify her in returning it. The collections were evidently made upon the assumption that the leasehold estate had been lawfully taken and vested under the lease, and that ought to be sufficient to prevent her from maintaining her claim to return the money collected as the shares of the others named in it. The collections were evidently made upon the assumption that the leasehold estate had been lawfully taken and vested under the lease, and that ought to be sufficient to prevent her from maintaining her claim to retain the money collected as the shares of the others named in it, as no adverse right to it had been advanced or maintained on the part of any other person.

But held, further, that the case does not show any real infirmity in the title made by plaintiff to the money as the personal representative of Smets.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis P. J.*, and *Brady J.* concurring.

MECHANIC'S LIEN. DEFENSES.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Wheeler vs. Schofield.

Decided January, 1876.

A party furnishing a contractor materials, &c., is not bound to notify owner of property in order to get and enforce his lien.

Where building was to be completed in one year, party may extend time verbally — lien will hold, &c.

In January, 1873, defendant made a contract in writing, in and by which C & P were to build him a house and furnish materials therefor, at an agreed price, and complete same in good workmanlike manner, on or before December 1st, 1873.

The building was not completed by December 1, 1873, but with defendant's consent C & P continue to work under said contract until January 8, 1874, when C & P failed in business, and their workmen struck, and defendant with the consent of C & P went on and finished up the work.

Plaintiff, who had furnished materials for said house to C & P filed a mechanic's lien on the property, and this is an action to foreclose it.

C testified on the trial, on the part of the plaintiff, that he and P did not abandon the work, nor consent to allow defendant to finish the building, and he was asked by the plaintiff's counsel whether the persons having filed liens had offered them assistance on the Monday after the workmen had ceased to work on the building.

The question was objected to, overruled, and witness answered "that they had."

Held, That the question asked witness above, was incompetent, but the admission of it was so immaterial that it could not harm defendant. It might furnish a reason why the contractor would not be likely to consent to abandon the work if

they had the promise of aid in completing it.

But it was proved to the satisfaction of the referee that the contractor had agreed that defendant might complete the work, and the other fact became wholly unimportant.

Defendant insisted that plaintiff was not entitled to recover for the reason that the contractors had never completed the building, and no valid reason was shown for not completing it.

And 2d. Plaintiff had not shown that the materials furnished by him and used in the construction of the house, were furnished with the knowledge or consent of the owner.

Held, That after plaintiffs had allowed the contractors to continue work on the building for a month after the time specified in the contract, it was too late for him to insist on performance on the day. A party desiring to insist upon strict performance must take his stand promptly.

Held also, That it is not necessary that a person furnishing material or labor to a contractor should obtain the consent of the owner of the building, such a requirement would lead to great delay and no corresponding benefit. It is enough that the owner knows that labor or materials are being furnished to the contractor and such owner does not object to it.

Judgment affirmed.

Opinion by *Mullin, P. J.*; *Smith and Gilbert, JJ.*, concurring.

NEGOTIABLE PAPER — FRAUDULENT ALTERATION.

SUPREME COURT OF PENNSYLVANIA.

Brown, plff. in error, v. Reed defdt in error.

Decided November Term, 1875.

Negotiable paper issued in such condition as to be easily susceptible of alteration amounting to a forgery, will be enforced in the hands of a bona fide holder. But where, as in this case, an instrument not purporting to be negotiable paper, but capable of being readily altered, without selection, into such, is signed, whether or not the party signing was guilty of negligence, is a question of fact for the jury.

Error to Erie County. Action upon a promissory note for \$250. The plaintiff it was proved, was a *bona fide* holder for value without notice. Plaintiff in error offered to prove the note was but a part of an instrument, which, when he signed it, was in the following form :

PRINTED AGREEMENT OF AGENCY.

NORTH EAST, April 20, 1872.

Six months after date I promise to pay J. B. Smith or
order Two HUNDRED AND FIFTY dollars
for value received, with legal interest, without
defalcation or stay of execution.

bearer fifty dollars when I sell by
worth of Hay and Harvest Grinders,
appeal, and also without

T. H. BROWN.

Agent for Hay and Harvest Grinders ;

and that the paper, since it was signed, had been cut in two.

This proof was objected to, and ruled out.

Verdict was directed for defendant in error.

Held. That if the maker of a bill, note or check issues it in such a condition that it can be easily altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity ; he cannot be discharged from his obligation by reason, or on account of his own negligence, in executing and issuing a note that invited tampering with. It is the duty of the maker of the note to guard not only himself, but the public, against frauds and alterations, by refusing to sign negotiable paper, made in such form as to admit of fraudulent practices upon them, with ease and without ready detection.

2. But in this case the maker did not sign what, upon its face, purported to be a negotiable promissory note, but a contract by which he was to become an agent for the sale of certain articles. Whether there was negligence, was clearly a question of fact for the jury. The line of demarcation, between the two parts might have been so clear and distinct, and given the instrument so unusual an appearance as ought to have arrested the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the holder cannot avail him.

The cases of *Phelan v. Moss*, 17 P. F. Smith, 59 ; *Zimmerman v. Rote*, 25 P. F. Smith, 188 ; and *Garrard v. Hadden*, 17 Id. 62, are distinguishable from the present. In the two former, the party signed a perfect promissory note, on the margin of, or underneath which, was written a condition which, as between the parties, was part of the contract, and destroyed its negotiability, but it could easily be separated, leaving the note perfect. In the latter the note was executed with a blank, by which the amount might be increased without a score to guard against such alteration.

The evidence offered should have been received.

Judgment reversed, and new trial ordered.

Opinion by *Sharswood, J.*

ORDER OF ARREST.

N. Y. SUPREME COURT.—GEN'L. TERM.
FIRST DEPT.

Henry H Morange, *appl't*, v. Albert G. Waldron, *resp't*.

Decided January 28th, 1876.

Where the money may be received and credited in an account and the balance of account afterwards paid as a matter of general indebtedness no right of arrest exists under sub. 2 § 179 of the Code

To render the person liable to arrest under the above section of the Code the identical money received must be the property of the creditor.

Appeal from order setting aside execution against the person and discharging the defendant from custody.

An execution was issued against the person of the defendant upon the judgment recovered, because it was supposed that the action was one in which he might be arrested according to subdivision 2 of § 179 of the Code. No order of arrest was obtained in the case, but the cause of action set forth in the complaint was alone relied upon to justify an arrest upon the execution.

Judgment was obtained without application to the Court for want of an answer.

The following facts were averred in the complaint:

That the defendants were auctioneers, and as such sold and delivered for the account of the plaintiff divers pieces of furniture.

That "the defendant received for the account and benefit of the plaintiff in their capacity of auctioneers the sum of \$21.78, and that there remains due and owing from the defendants to the plaintiff the sum of \$210.67 with the interest

from the 26th of April, 1872, and which said sum hath been often demanded but refused."

There was no allegation made that the furniture was the plaintiff's property, though that may be reasonably inferred to be the fact.

H. H. Morange, for *appl't* in person.
John H. Thedlock, for *resp't*.

Held, That from the facts appearing in the complaint there is nothing inconsistent with the defendants receiving the money and crediting plaintiff the amount so received on account and afterwards paying the balance due with any other funds subject to their use and control. They appear to be consistent with the existence of just such an understanding. Receiving money for the account and benefit of the plaintiff imposed a different obligation from the fact of receiving it to be paid over to him. The averments in the complaint do not show that the balance sued for was money received by either of the defendants in a fiduciary capacity. To render the person liable to arrest under the provision of that subdivision relating to money received in a fiduciary capacity the identical money received must be the property of the creditor. When the money may be received and credited in account and the balance of account afterwards paid as a matter of general indebtedness no right of arrest exists under Sub 2, § 179 of the Code.

Order affirmed with \$10 costs and disbursements. But execution having been issued in good faith, order modified requiring defendant to stipulate not to bring action for false imprisonment.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.* concurring.

PAYMENT. STOCK-BROKING. ACCOUNT STATED.

N. Y. COURT OF APPEALS.

Quincy, *resp't.*, v. White (impleaded, etc.) *appl't*.

Decided December 14th, 1875.

A voluntary payment cannot be recovered. Fear of the result of an arbitration is not DURESS, and cannot affect the fact of its being made voluntarily.

A person selling pledged stock "under the rule" may purchase it himself.

It is not sufficient proof of the correctness of an account when presented, that no objection is made; enough must be shown to justify such an inference.

It is not PER SE unlawful as against public policy for several persons to unite in speculating in a particular stock. As to what kind of combination would be unlawful QUERE.

This action was brought to recover a balance of account claimed to be due H. & Co., of which firm plaintiff was a member, and now holds the account by assignment. The parties are all stock brokers. It appeared that in the spring of 1870 W. & Y. arranged to deal in P. & R. R. stock with H. & Co. as their brokers. Appellant soon after joined the enterprise, and the business continued until July 15th, when the stock was much depressed and a heavy loss seemed imminent. Y. thereupon declared himself unable to respond to calls for margin. Appellant and W. each took and paid for one-third of the stock then in the "pool," which amounted to over 80,000 shares, and the sum claimed in this action is substantially for losses incurred in closing out the other third. Defendant claimed that the liability was not joint, that by the arrangement between W. & Y. and H. & Co. the former were to be liable only for their respective shares, and that this arrangement was unchanged when defendant came in, and that on July 15th, when Y. failed, that matters were compromised by an arrangement that defendant and W. should each take and pay for one-third of the stock, and that H. & Co., were to assume the other third, and that defendant and W. were to assist him in carrying it by loaning them money and manipulating and

selling and buying the stock so as to avoid loss if possible.

The referee, however, found with the plaintiff that the arrangement was joint, and that upon the failure of Y. plaintiff only agreed to carry one-third of the stock until it fell to 95, when defendants were to take and pay for it.

On July 23d H. & Co. gave appellant and W. a written notice that they should hold them jointly liable for the whole account. Upon receipt of this notice W. proceeded after notice to sell at the public board 7,100 shares of the joint stock upon which he had loaned H. & Co., after July 15th, 95 per cent of the par value, and upon the sale he purchased in the stock, with the concurrence of appellant, leaving a deficiency of \$5,380, which he claimed of H. & Co., and cited them before the arbitration committee of the stock board, but before the day to which the hearing was adjourned, they paid defendant that amount. This was allowed plaintiff, and is included in the judgment. H. & Co. sold the remaining stock in their hands and made up a joint account against the parties, which was delivered July 28th, and showed a large balance due for which plaintiff recovered.

Held, That the payment by plaintiff was voluntary, as fear of the decision of of the arbitration committee was not duress, and, having made it with full knowledge of the facts, the controversy as to that stock was ended, and the judgment could not be recovered back.

It is to be observed that a person selling pledged stocks "under the rule" (so called) has a right to purchase himself, as in the case of foreclosure of other liens.

On the 27th of July H. & Co. rendered to defendants an account as claimed by them. The referee found that it was accepted approved. There was no direct evidence of acceptance or approval, and it only could be found as an inference from not objecting.

Held, That it could not have been set

of an account stated, as the circumstances to justify an inference of assent are not shown. To render an account presented *prima facie* proof of correctness, there must be enough shown to justify such an inference.

It is not *per se* unlawful as against public policy for several persons to unite upon a special venture of dealing in a particular stock.

As to what kind of combination for stock operations, or what means used in pursuance of the purposes thereof, will be deemed unlawful, *quære*.

Judgment affirmed save as to \$5,380 and interest, being the deficiency upon the stock sold by W.

Opinion by *Church, J.*

PLEADINGS, AMENDMENTS.

SUPREME COURT, GEN. TERM.

FIRST DEPT.,

Rocky Mountain National Bank of Central City, *applt.*, v. George Bliss, *respt.*

Decided Jan. 25, 1876.

An order denying a motion to amend a pleading is appealable.

An amendment changing a cause of action upon certain notes to an action to recover certain loans for which the notes were given, cannot be regarded as the substitution of a new cause of action.

Appeal from order of Special Term denying motion for leave to amend complaint.

This action was brought to recover of the defendant as a stockholder of the Ophir Mining Company, the amount of certain promissory notes upon which judgment had been obtained in Colorado, amounting together to about \$7,000, made by the Ophir Gold Mining Company to plaintiff. The Ophir Gold Mining Company was incorporated under a general act of the Legislature of the State of New York, provided for the incorporation of mining and other companies.

It is claimed by plaintiff that the defendant is liable for the amount of the notes aforesaid, on the ground that no certificate had been filed, that the capital stock of the company (see Ch. 40, Laws 1848, p. 56) had been paid in full, and failure to comply with the provisions of the statute.

The complainant alleged the recovery of a judgment upon such notes against the Ophir Mining Company aforesaid, in the Territory of Colorado.

Subsequently it was discovered that the judgment aforesaid, was recovered upon the loans by plaintiff to the Ophir Mining Company, for which the notes aforesaid were given.

And this motion is made for the purpose of amending the complaint, so that same shall clearly state a cause of action for the amount of the loans by plaintiff to the Ophir Gold Mining Company, instead of, as now a cause of action on the notes. The motion in the court below was opposed on the ground, that the motion sought to change entirely the cause of action.

2. On the ground that a new action on the loans would be barred by the statute of limitations.

The court below denied the motion to amend, from which order this appeal was taken.

It was claimed on the appeal in behalf of respondents that the order was not appealable.

J. Van Cott, for *applt.*

Robinson & Scribner, for *respt.*

Held, That under the later decisions of the Court of Appeals this order must be held appealable, (53 N. Y. 215; 29 N. Y. 418; 53 N. Y. 322; 10 Abb. Pr. (N. S.) 416).

Held further, That the court below misapprehended the nature and object of the amendment in regarding the proposed amendment as the substitution of a new cause of action for that set out in the complaint.

The notes were the evidence of the indebtedness, it is true, and yet as the indebtedness was created simultaneously with the notes, a recovery upon the notes would be of legal necessity a recovery upon the original indebtedness of the company. Even under the present allegations of the company, proof of the facts as they now appear would not be a fatal variance, and it would be the duty of the court at the trial to amend the complaint in accordance with the facts as they are now shown on the motion.

That it thus appearing that the amendments would not have the effect to substitute a new cause of action, the objection that the Statute of Limitations had run falls to the ground.

Order reversed and motion to amend granted.

Opinion by *Davis, P. J.*; *Brady and Daniels* Justices, concurring.

PRACTICE. FORECLOSURE SALE.
N. Y. SUPREME COURT, GENL. TERM,
FIRST DEPT.

Knight, resp't, v. Maloney, applt.
Decided December 30, 1875.

Order releasing defendant, bidding at foreclosure sale, of his bid, and directing referee to pay from the ten per cent deposit expenses of sale, fees and expenses of re-sale; defendant entitled only to the balance of deposit after paying referee's fees and expenses of first sale, attorney's costs and expenses of re sale.

Improper entry of an order should be corrected by a motion to resettle the order.

Appeal from order denying motion for an order directing the referee to pay over certain moneys received by him as deposit on a foreclosure sale.

This action was brought to foreclose a mortgage on certain property owned by defendant and his sister.

Defendant, on the foreclosure sale, bid in the property, depositing with the referee ten per cent of the purchase money. After

the sale it was discovered that no guardian *ad litem* had been appointed for defendant's wife, she being an infant. On the ground that this irregularity would prevent his getting a good title, he sought to be released from his bid, but his motion was denied and he was ordered to take the title.

The order further provided that the referee should pay from the ten per cent deposit in his hands the referee's fees, costs, expenses, &c, and hold the balance to meet any deficiency from the second sale, and that unless he completed the purchase the judgment should be vacated and the action be prosecuted against his infant wife. On appeal to the General Term the order was modified so as to release defendant from his bid, and ordering the referee to pay the expenses of the re-sale, after the proceedings were perfected, out of the deposit, and to pay the balance to defendant, after deducting costs, &c. Defendant failed to take the title and the judgment was set aside and proceedings taken in due form against the infant defendant, and on the entry of this second judgment a second bill of costs was taxed in full, which, with the expenses of the second sale, the referee deducted from the purchase money. On the ground that the order of the General Term required the deduction of only the expenses of the second sale, and not that defendant should pay two bills of costs, fees and expenses, defendant sought for an order requiring the referee to pay back the amount deposited with him by defendant, and from the order denying the motion this appeal is taken.

Jos. C. Hays, for resp't.

Jno. H. Hull, for applt.

On appeal *Held*, That, as the order was entered, the appellant was entitled only to the balance left of his ten per cent, after deducting referee's fees, expenses of the first sale, the attorney's costs and the expenses of the re-sale.

If the order in any respect was improperly entered, the remedy for its correction

was by a motion for its resettlement, and not for an order requiring the referee to act in violation of the terms of the former order.

Order affirmed without prejudice to a motion for a resettlement of the order of the General Term.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring.

PRACTICE. IMPROVIDENT ORDER. MARINE COURT—CITY OF NEW YORK.

A. Schlumpf v. Henry Downes, Jose Vilar et al.

Decided January 27, 1876.

An order made upon unfounded allegations of fact, which, had they been true, would have sustained it, is not improvidently granted.

This was an action in which an attachment was issued against property of defendants, in which J. & P. Vilar appeared by attorney, and on December 23, 1875, caused to be served on Sheriff an undertaking on part of said defendants to vacate and set aside said attachment, and on same day served copy on plaintiff's attorney. Plaintiff's attorney did not except to sufficiency of the sureties within three days. These facts appearing by affidavit of one of defendants' attorneys, the Court did, by a *ex parte* order, on December 28, 1875, vacate and set aside said attachment as to property of J. & P. Vilar. Plaintiff's attorney then obtained an order to show cause why said order of December 28, 1875 should not be set aside as improvidently made, for that the same was obtained by misrepresentations.

T. Darlington, for plaintiff

Brown & Rube, for defendants Vilars.

Held, The order to show cause does not specify in what respect the order dated December 28, 1875, was improvidently made, nor by what alleged misrepresentations it was obtained; neither does the affidavit on which the order to show cause was obtained set out any such misrepresentations. It sets out that defendant served

notice on plaintiff's attorney; that the original undertaking was duly filed in the sheriff's office. But this is not a misrepresentation to this Court, nor does the affidavit allege that no such original was filed, but only that somebody said so. That party may have made the misrepresentations and not the defendants' attorney. I cannot see wherein the order of Judge Spaulding was improvidently made. If it was made upon unfounded allegations of fact, which, had they been true, would have sustained it, it was not improvidently granted. The plaintiff has mistaken his remedy. If he had served notice of exception he holds the sheriff liable. If his proof of having given such notice is missing, his application should be to supply that. If the original undertaking is necessary, his application should be to supply that loss. In either case I do not see any reason to disturb the order of December 28. If he claims that no original bond was ever filed, he must allege and prove that. He has very clearly done neither.

Motion denied.

Goepp, J.

PRACTICE. NUISANCE.

N. Y. COURT OF APPEALS.

Campbell et al. respts. vs. Seaman applt.

Decided January, 18, 1876.

Burning brick with anthracite coal for fuel is a nuisance.

A refusal to grant an injunction is appealable.

A judgment claimed to be broader and more unlimited than the report of a referee authorizes, can only be corrected on motion to correct or set aside the judgment, it can not be corrected on appeal.

An appeal heard at General Term by three Judges can, after the death of one, be decided by the other two.

This action was brought to recover damages for injuries done to plaintiff's property, and for an injunction restraining defendant from manufacturing brick on his own premises by means of mineral coals. It appeared that plaintiffs are the

owners of certain real estate upon which they had erected an expensive dwelling house in 1857, and since then they have been engaged in improving and beautifying by grading, terracing, laying out roads and walks, and planting trees and shrubs, both ornamental and useful. Defendant owned a brick yard which adjoined plaintiffs' land, and was about 1,320 feet south of their dwelling house, and 567 feet south of their woods. Defendant, in burning brick, used anthracite coal, and during the burning of a kiln sulphuric acid gas, which is poisonous to vegetation, was generated in quantities, and when the wind blew from the south, while the kilns were burning, this gas was carried upon plaintiffs' property, and had, after repeated attacks, destroyed many of plaintiffs' ornamental trees, and had injured their grape vines and plum trees. It also appeared that defendant's property had been used as a brick yard at intervals before plaintiffs purchased their property, and for more than twenty years.

G. W. Miller for applt.

G. P. Jenks for respts.

Held, That the burning of the brick with anthracite coal for fuel was a nuisance, and plaintiffs were entitled to an injunction restraining defendant from the use of the same; that an injunction was the proper remedy for plaintiffs, as an action at law was not an adequate remedy. An injunction can be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate tribunal. The granting or refusal of it is a matter of grace only in that it rests in the sound discretion of the Court, and if that discretion is improperly exercised, the error can be corrected on appeal. The fact that the brick burning was not continual, and that the injury was only occasional, furnished no answer to the claim for an injunction.

It did not matter that defendant's property was used as a brickyard before plaintiffs

purchased the adjoining land. One cannot erect a nuisance upon his land adjoining vacant lands owned by another, and thus measurably control the uses to which his neighbors' land may, in the future, be subjected.

It appeared that from 1840 to 1853 no bricks were burned upon the defendant's premises; that bricks were burned there from 1853 to 1857; that the brickyard was ploughed and used for agricultural purposes from 1857 to 1867; that plaintiffs objected to the brickmaking before this suit was brought.

Held. That no such acquiescence in the nuisance by plaintiffs was shown as would be a bar to the relief sought; that defendant could not claim a right by prescription, as, if such right could be thus acquired, there had not been a continuous user and exercise of the right, by which alone it could be established.

It was claimed that the portion of the judgment awarding an injunction, was broader and more unlimited than the report of the referee authorized.

Held, That the error, if it existed, could only be corrected on motion to correct it, or to set aside the judgment; it could not be corrected on appeal.

It appeared that one of the judges who heard the appeal at General Term, died before the decision was made, and the appeal was decided by the two remaining judges, and this appeal is from that decision.

Held. That the decision was properly made, as two judges can hold a General Term. 2 Lans, 499.

Judgment of General Term, affirming judgment for plaintiffs, entered upon report of referee, affirmed.

Opinion by *Earl, J.*

REPAIRS.

CONNECTICUT SUPREME COURT OF ERRORS.

Daniel Hatch and another agst Anna Stamper.

Decided January, 1875.

Lessee bound to make ordinary repairs.

Statute 1869 applies only to cases where the building becomes untenable by reason of some sudden and unexpected calamity.

Assumpsit for the use and occupation of leased premises brought to the Court of Common Pleas of Fairfield County, and tried to the Court, on the general issue with notice, before DeForest J. Judgment for the plaintiffs, and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

Carpenter, J.: The plaintiffs leased to the defendant, for the term of one year, an old two-story dwelling-house, the lower story of which she used for a millinery store, and the upper for a residence. The lease was by parol, the lessors agreeing to repair the roof and water pipes, but nothing more. Around the windows, and where an addition was joined to the main building, water came in during rain storms and damaged the defendant's goods to the amount of several hundred dollars. The leakage also rendered the occupancy of the house inconvenient in other respects, making it damp, and to some extent unhealthy. Both parties refused to repair, and at the end of the tenth month the defendant vacated the premises and tendered the possession thereof to the plaintiffs, which they refused to accept. This suit is brought to recover rent for the remainder of the term.

The defendant claims that the leased premises had become untenable, that by the act of 1869 she was justified in vacating them, and that she was absolved from all liability to pay rent thereafter.

It is conceded that by the common law, unless otherwise agreed, the tenant is bound to make ordinary repairs. But it is claimed that the statute referred to, in the absence of a special agreement, charges the common law in this respect, and throws the burden of making all repairs upon the landlord.

The statute referred to is as follows: "The lessee, lessees, or occupants of any

building which shall have been or shall be, without any fault or neglect on their part, destroyed or so injured by the elements or any other cause as to be untenable or unfit for occupancy, shall not be liable or bound to pay rent to the lessor, lessors or owners thereof after such destruction or injury, unless otherwise expressly provided by written agreement between such parties." It further provides that the lessee may quit possession of the leased building, surrender the same to the lessor, and require the cancellation of the lease.

This statute manifestly has no reference to ordinary repairs, such as the lessee at common law is bound to make. It applies only to cases where the building becomes untenable by reason of some sudden and unexpected calamity; as where it is wholly or partially destroyed by fire, water, or by a mob, or other like cause. It was designed to relieve the tenant of the burden of paying rent after it had become impossible for him to use and occupy the premises leased.

In this case the motion describes the condition of the building, states that the leakage "might have been prevented by proper repairs, and at no great expense," and expressly finds as follows: "that said tenement did not become in fact untenable or unfit for occupancy from the causes aforesaid, or from any other cause, during the term of said lease."

The case, therefore, is not within the statute; and the court below, in deciding, upon the facts stated, that the defendant was liable for rent, decided correctly, and a new trial must be refused.

SALE OF GROWING TREES. IN TEREST IN LAND. STATUTE OF FRAUDS.

ENGLISH REPORTS. COMMON PLEAS
DIVISION.

Marshall v. Green.

Decided Nov. 6, 1875.

A sale of growing timber, to be taken

away by the purchaser as soon as possible, is not a contract for or sale of land or any interest therein, within the 4th Section of the Statute of Frauds.

Such a sale is within the 17th Section, and a portion of the trees having been cut, that was an acceptance and actual receipt of a part of the goods sold, which made the oral contract of sale binding within the meaning of the Section.

Declaration. 1st count for trespass to land and cutting down certain trees of the plaintiff; 2d, trover.

Pleas: Not guilty, not possessed, leave and license, &c., and a special plea setting forth that the plaintiff had sold to defendant a large quantity of timber trees growing upon the land, with liberty to the defendant to go on the land to remove the trees, and that the acts complained of were done in pursuance of the agreement, and with the privity and consent of plaintiff. Issues thereon.

On the trial it appeared that plaintiff was the owner of the land upon which the timber was growing; that negotiations having been had between plaintiff and defendant as to the purchase of the timber by the latter, and some controversy having arisen as to the number of trees, the parties, on February 27th, went over the ground, viewed the trees, and contracted orally that defendant should take 22 trees at 26£., the trees to be got away as soon as possible.

The defendant entered and commenced to cut the trees upon the 2d of March. When six trees had been cut the plaintiff countermanded the sale and demanded an alteration of the terms before allowing the remaining timber to be felled. Nevertheless defendant felled the balance, and, notwithstanding a notice from plaintiff to the contrary, subsequently removed the whole.

Before the plaintiff had countermanded the sale, the defendant had agreed to sell the stumps and tops to a third person.

Upon these facts a verdict was entered for plaintiff, leave being reserved to defendant to move to enter it for himself, on the grounds that the facts disclosed a right on the part of defendant to cut down and remove the trees.

A rule *nisi* had been obtained accordingly.

Held, (by Coleridge, C. J.) If there was a valid sale of the trees, plaintiff must fail. It is not denied that there was a verbal contract, and the question, therefore, is whether this was a contract which required to be in writing under the Statute of Frauds. The first question is whether this was a contract within the 4th section, as being a "contract or sale of lands, tenements or hereditaments, or any interest in or concerning them." If the matter were *res integra*, I should be inclined to think that the words of the Statute were never meant to apply to such a matter as this at all, but referred only to such interests as are known to conveyancers. It is, however, too late to maintain this view now.

It is clear on the decisions that there are certain natural growths which, under certain circumstances, have been held to be within the Section. It is difficult to lay down a rule which can stand the test of every case.

I find the following statement of the law with regard to this subject, in the notes in Williams' Saunders upon the case of Duppa v. Mayo, p 395." The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the con-

tract is for goods sold. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales*, &c., the corn and other growth of the earth which are produced not spontaneously, but by labor and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods."

The propositions so laid down, as applied to the present case, seem to afford a very clear and intelligible rule. Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decision on the subject, and as a matter of common sense it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber. It seems to me, therefore, that both common sense and authority combine to show that this was not a contract for an interest in land within the Section.

2. The remaining question is whether this contract was within the 17th section. This depends on whether there was here an acceptance and actual receipt of part the goods:

It was very early determined that an actual manual receipt of the article was not necessary, but that a constructive receipt would do. Here six of the trees were cut down before the sale was countermanded, and at a time when it must be taken that that was done with the assent of the owner. What more could have been done short of actually removing the trees?

If anything short of actual manual possession could be sufficient, all was done that could be done. The trees were bulky, and could not well be removed. The defendant had exercised an act of

ownership by selling the tops and stumps—the words of the section having received all the fulfilment the subject matter was capable of.

Held, (by Brett, J.) There are certain tests applicable to peculiar cases. Where the subject-matter of the contract is growing in the land at the time of the sale, then if by the contract the thing sold is to be delivered at once by the seller, the case is not within the section; where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, the case also is not within the section. Then there comes the class of cases where the purchaser is to take the thing away himself. In such case where the things are *fructus industriales*, then, although they are still to derive a benefit from the land after the sale, in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive a benefit from so remaining; then part of the subject matter of the contract is the interest in the land, and the case is within the section. But if the thing, not being *fructus industriales*, is to be delivered immediately, whether the seller is to deliver or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in land, but relates solely to thing sold itself.

Here the trees purchased were timber-trees, and the purchaser was to take them immediately; therefore, applying the test last mentioned, the contract was not within the 4th Section.

In regard to the question whether or not there was an acceptance and actual

- receipt of a part of the goods, is the case with defendant.

It was conceded on the argument that there was an acceptance. In regard to the receipt, I should be inclined to say that where there is no actual removal of the things sold, the question depends on this proposition, viz: that when there has been, during the existence of the verbal contract, for however short a time, an actual possession of the things sold, and something has been actually done to the things themselves, by the buyer which could only properly be done by an absolute owner, there is evidence to go to a jury, of an actual receipt of the things. This case clearly comes within this proposition.

Held (by Grove, J.), It seems to me that, in determining the question whether there was a contract for an interest in land, we must look to what the parties intended to contract for.

Here the trees were to be cut as soon as possible, but even assuming they were not to be cut for a month, I think the test would be whether the parties really looked to their deriving benefit from the land, or merely that the land should be in the nature of a warehouse for the trees during that period. Here the parties clearly never contemplated that the purchaser should derive any benefit from the soil. If the contract had been for the sale of a young plantation, of rapidly growing timber which was not to be cut down until it had become substantially changed, and had derived benefit from the land, there might have been an interest in the land, but this is not such a case. In regard to the second question, I agree with my brethren.

Rule discharged.

TAXES.

CONNECTICUT SUPREME COURT OF ERRORS.

Samuel S. Rowland and others v. The First School District of Weston.

Decided January, 1857.

A Court of Equity will not interfere

by injunction with the collection of taxes.

Petition for an injunction against the collection of a school district tax claimed to be illegal: brought to the Court of Common Pleas of Fairfield County. Upon a demurrer the court (Brewster, J) dismissed the petition, and the petitioners brought the record before this court by a motion in error. The points of law decided will be sufficiently understood without a statement of the case.

Foster, J. It is quite unnecessary to the decision of this case to enter into any discussion as to the powers and duties of a court of equity to interfere by injunction with the collection of taxes. The subject has been before this court in several cases recently. (Arnold v. Middletown, 39 Conn. 401; Dodd v. City of Hartford, 25 Conn. 232.) The case of Dodd v. City of Hartford is on all fours with the case at bar. The only ground of difference suggested is that in that case the plaintiff sought to protect his personal property from being levied upon, and in this case the injunction is asked to protect real estate. We perceive no substantial reason why an injunction should be granted to protect real estate from a levy that would not apply, with equal force, to personal estate. If there be any difference, the necessity for protecting personal property would seem to be the greater. A party might be deprived of personal chattels, even under an illegal taking, and so be compelled to resort to an action for damages as the only redress. Not so in regard to real estate. There could be no motion of that by any levy, valid or void. That would remain *in statu quo ante censum*. If the preliminary proceedings were illegal and void, as in this case they are claimed to be, neither the land nor the owner would be in danger of any such injury as that the extraordinary powers of a court of equity need be invoked for protection.

We can give no countenance to the argument of the plaintiff's counsel impugning

the authority of *Dodd v. City of Hartford*. We think that case was correctly decided, and we regard the principles enunciated in it to be sound and salutary. If the plaintiff is correct in his claim if the proceedings of the defendants are wholly unwarranted by law, the injury impending is in no sense irreparable, and there is ample remedy in the courts of law. On the other hand, should the plaintiff be mistaken, and should it finally appear that this tax has been duly and legally imposed, surely no court of equity should interfere. We discover, therefore, no sufficient grounds on which to rest the exercise of the extreme, though sometimes necessary, power of a court of chancery to stay proceedings by injunction. (*Hine v. Stephens*, 33 Conn. 505; *Munson v. Munson*, 28 Conn. 582; *Sheldon v. Centre School District*, 25 Conn. 224.)

There is no error in the judgment below.

TENDER.

SUPREME COURT—GENERAL TERM. FIRST DEPT.

Frederick L. Berringer, respt., v. Louis Wengenroth, applt.

Decided January 28, 1876.

In an action upon the second of two notes, given upon consideration of the assignment of a judgment by the party receiving the notes, such assignment to be made upon the payment of the notes, an offer to assign must be shown before a recovery can be had.

Appeal from a judgment on the verdict of a jury.

In this case the plaintiff sought to recover upon one of two notes given by the defendant to George Fuiling, the consideration for which was the assignment of a judgment held by him against one W., defendant's brother. The first note was paid. The

issue upon the trial was whether the assignment of the judgment was to be made after the payment of the first note or on the payment of both.

It appeared, however, on the trial that subsequent to the maturity of the note in suit it was transferred to plaintiff, and the judgment assigned to him also. There was no offer by plaintiff to assign the judgment at any time made, and when, upon the close of the case, the Judge was requested to charge that the plaintiff could not recover without such an offer, the request was refused and an exception taken to the ruling thus made.

Henry Daily, for respt.

D. M. Potter, for applt.

Held, That the consideration—the whole consideration—of both notes was the assignment of the judgment. Assuming, therefore, that the plaintiff's assignor had the right to assign the judgment, although it deprived him of the power to perform his agreement with the defendant, and that the plaintiff is in all respects his representative or succeeds to his rights and obligations, it is quite clear that the defendant was entitled to the assignment of the judgment, or an offer to assign it, before any judgment could be obtained against him. (*Lister v. Jewett*, 11 N. Y. 456.) If either party would sue upon this agreement, the plaintiff for not paying or the defendant for not transferring, the one must aver or prove a transfer and the other a payment or a tender. (*Payne v. Lansing*, 2 Wen. 525.)

The acts would, under the agreement, assuming it to be as claimed by the plaintiff's assignor, be necessarily concurrent or simultaneous—the defendant's readiness to pay and the plaintiff's readiness to deliver the assignment.

The plaintiff should not have recovered without proving an offer to assign the judgment.

Judgment reversed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

TOWN BONDS. REMEDY OF HOLDERS.

N. Y. COURT OF APPEALS.

*Marsh, respt., vs. Town of Little Valley
appls.*

Decided February 1, 1876.

*A town is obliged to provide for the
payment of bonds issued by them.*

*If a town fails to pay its bonds, an
action will lie against them, and if
judgment is obtained, the board of
supervisors are to assess, levy, collect
and pay the same as other contin-
gent charges.*

*When a party has a legal remedy, by
action, against a town, a mandamus
will not lie.*

*The repeal of the act under which town
bonds have been issued, does not affect
the bonds already issued, and the
holders have a vested right to collect
them that cannot be impaired.*

This action was brought upon three town bonds purporting to have been issued in pursuance of chapter 590, Laws of 1869, which legalized the acts and proceedings of the electors at a special town meeting, in the town of Little Valley. Cattaraugus Co., which had previously been held for the purpose of raising money to pay bounties for furnishing substitutes, and authorized the board of town auditors to audit such claims, and authorizing the issue of town bonds to each person furnishing a substitute as therein provided. The fourth section of the act declared that said bonds should be legal claims against the town, and the fifth section made it the duty of the board of supervisors, at any annual meeting, to

levy and impose a tax for the payment of said bonds. The bonds were issued as required by the statute.

Defendant insisted that plaintiff's remedy was by mandamus, not by action.

Cary & Jewell, for respts.

Henderson & Wentworth, for applts.

Held. That the town is obliged to provide for the payment of the bonds, and that the amounts secured by them are not in the nature of unliquidated demands, which are required to be audited by the proper officers, but upon their face are admitted debts, and, in the hands of *bona fide* holders, lawful demands against the town, and upon a failure of the officer of the town to pay the bonds an action will lie against the town, which is a body corporate, capable of being sold (1 R. S., 337, § 12; 1 R. S., 473, § 95), and, if judgment is obtained, it becomes a town charge, which is to be laid before the Board of Supervisor, and the amount assessed, levied and collected, the same as other contingent charges against the town (4 Lans. 409; 5 id., 267; 2 T. & C., 108).

Also Held, That as plaintiff had a clear legal remedy by action against the town, a mandamus would not lie (2 Hill, 45; 46 N. Y., 9; 49 Barb., 264).

Also Held, That the repeal of the act under which the bonds were issued (Chap. 590, Laws 1869) by Chap. 21, Laws of 1873 could not affect the bonds already issued, and the holders have a vested right to collect them, and this right could not be impaired by any subsequent modification of the statute.

Judgment of General Term affirming judgment for plaintiff at Circuit affirmed.

Opinion by *Miller, J.*

NEW YORK WEEKLY DIGEST.

Vol. 2.] MONDAY FEBRUARY 28. 1876. [No. 2.

BROKER.

N. Y. COURT OF APPEALS.

Miller, *app't.* v. Irish, et al, *respt.*

Decided January 18th, 1876.

In an action against the vendor to recover brokerage on a sale of real estate, evidence that plaintiff was acting in the interests of the buyer is admissible.

This action was brought to recover, for services of plaintiff, as broker in selling certain real estate for the defendants, and as attorney in reference to the sale. The complaint alleged that in the two capacities plaintiff did a series of acts for the defendants, at their instance, and for all of these acts plaintiff demanded payment of a certain percentage of the purchase money of the property sold.

Upon the trial evidence was given tending to show that plaintiff was acting in the interest of the buyers; this was objected to by plaintiff on the ground that it related to occurrences after the completion of his contract as broker. The objection was overruled.

W. C. Burton, for app't.

John Gaul, Jr., for respt.

Held. No error; that the complaint set up one continuous service, and that the extent of plaintiff's employment, the value of the services, having been put in issue, the evidence was admissible.

Defendant also offered to prove an offer to pay plaintiff for drawing the contract, and other papers. This evidence was received under objection.

Held. No error; that it being a part of the transaction between the parties, it was proper; that it did not harm plaintiffs, or have the effect to deprive him of a recovery of his compensation for drawing the papers.

Judgment of General Term, affirming judgment entered on verdict for defend-

ants, and order denying new trial affirmed.

Per curiam opinion.

CONFLICT OF LAWS. WILL. FOREIGN JUDGMENT.

N. Y. COURT OF APPEALS.

Rice, *exr.*, &c., *respt.*, v. Harbeson et al., *appls.*

Decided January 18, 1876.

Where a conflict arises between the laws of two States as to the distribution of of personal property, the law of the State where the property is situated must control.

The judgment of another State affecting the distribution of the personal property of a deceased citizen of this State, is of no effect as against the decree of a court of this State.

Where a will divides the whole of testator's property into certain portions, but was not properly executed as a will of real estate, and the heirs at law recover the realty, they must resort in the first instance to that to pay a mortgage upon it, but any deficiency will be paid from the personalty.

This was an appeal from an order of the General Term reversing that part of a decree of the Surrogate upon final accounting, which directed that a mortgage upon certain property belonging to plaintiff's testator in South Carolina be paid out of the personalty. It appeared that plaintiff's testator was a citizen of this State, and that he died leaving personal property here and real estate in South Carolina, which was mortgaged. By his will he directed that his property should be divided, after the payment of debts and certain specific legacies, into seven shares, payable to the legatees named. The will was proved in this State and in South Carolina, but in the latter State only as a will of personal estate, it not being properly executed as a will of real estate under the laws of that State. The heirs, in a suit in South Carolina, recovered the real estate and obtained a de-

decree that the mortgage should be paid by the executor under the will out of the personal property. A citation was served upon the holder of the mortgage to appear on the final accounting, and he appeared and filed his claim. The plain import of the will was that the property should be converted into money and divided into seven equal shares. If the mortgage should be paid as directed by the Surrogate's decree out of the personalty, the bequests in the will would be defeated. The recipients of six of the shares under the will would receive little or nothing, while the heirs at law, who, by the will, received but one share, would take nearly the whole estate. The testator did not own the land in South Carolina when his will was executed.

Malcolm Campbell, for applts.

Richard O'Gorman, for resp't.

Held, That to prevent the intent of the testator being defeated, the land in South Carolina should be charged with the payment of the mortgage, and in the absence of evidence that it was insufficient, or that there was any difficulty in obtaining a full indemnity, the holder of the mortgage was properly required to resort thereto, and payment of the mortgage out of the personal property properly refused. That the judgment in South Carolina could not control, but there being a conflict between the laws of the two States the *lex fori* must prevail. As the personal property was not within the State of South Carolina, or subject to its jurisdiction, it was proper for the courts of this State to adjudge in reference thereto, although such judgment affects real estate situate in South Carolina.

In case there should be a deficiency upon a foreclosure of the mortgage and sale of the mortgaged premises, the holder of the mortgage would still be entitled to resort to the personal estate to collect the deficiency.

Judgment affirmed.

Opinion by *Miller, J.*

CONSTITUTIONAL LAW. TAXATION.

N. Y. COURT OF APPEALS.

Weisner, app'lt., v. The Village of Douglas, respts.

Decided February 1, 1876.

The legislature has no power to authorize a municipal corporation to take stock in a private corporation, and to issue its bonds in payment thereof.

The legislature cannot impose, or delegate, to a municipal corporation, power to impose a tax for a private purpose.

The fact that interest has been paid and that a special tax voted to meet the future interest upon void bonds, does not estop a municipal corporation from denying the validity of the bonds.

This action was brought to recover the amount due on certain bonds issued by defendant under the provisions of chapter 837, Laws of 1867, which authorized defendant, with the consent of a majority of its taxpayers, representing a majority of the taxable property, to issue and negotiate its bonds, and with the moneys realized therefrom to subscribe for and take shares of the capital stock of a manufacturing corporation located in said village, and provided for taxation to meet the principal and interest of said bonds. The corporation was organized under the general manufacturing laws, to construct and improve a water privilege, and to manufacture lumber, &c. By an act of the legislature (chap. 837, Laws of 1867) it was authorized to purchase and take title to land flowed thereby.

D. D. Niles, for applt.

W. J. Welsh for resp't.

Held, That the legislature had not power to authorize the defendant to take

stock in a private corporation and to issue its bonds to pay therefor, and that the bonds so issued were void. *Town of Guilford v. Suprs of Chenango Co.* 13 N. Y., 143, distinguished.

The judge, at Special Term, found that the objects and purposes of the corporation, in aid of which the bonds were issued, were not exclusively and strictly of a private nature, but to some extent partook of a public character, and were sufficiently broad and extended to include a public use. He then explained how this general finding was reached by particulars which he gave. Defendant excepted to this finding.

Held, That the general finding was a conclusion of law from the particulars given, and as the evidence does not afford any ground for the finding, it was erroneous.

The legislative power of taxation, so far as the purposes for which it may be exercised, is not unlimited, and the courts are not debarred from scrutinizing its action.

The legislature is the primary authority to inquire what is a proper purpose for the application of money raised by taxation, and the necessity of taxation to subserve it, and it must appear clearly that it has erred before the courts can interfere.

Where no legal, moral or equitable claim exists, the legislature cannot impose or delegate to a municipal corporation the power to impose a tax for a private purpose, or directly to replace in the treasury moneys bestowed by it upon a private purpose. It was claimed that as interest had been paid upon the bonds by defendant, and a special tax had been voted by the taxable inhabitants to pay this interest, defendant was estopped from denying their validity.

Held, That this did not work an estoppel; that the issue of the bonds being beyond the scope of corporate power, defendant could not be debarred from raising that objection by any subsequent conduct of its offi-

cers and agents, and even if the inhabitants of defendant were estopped by the acts proved, the defendant would not be affected thereby; it is a political entity, separate and apart from the inhabitants of the territory within its corporate bounds. 12 Wall. 349; *Alleghany City v. McClastan*, 14 Penn. St. 81, disapproved.

Judgment of General term, reversing judgment of Special Term, and directing judgment for defendant, affirmed.

Opinion by *Folger, J.*

CONTEMPT. EVASION OF INJUNCTION. CORPORATION.

N. Y. COURT OF APPEALS.

The Mayor, &c., of New Jersey, *respts.* v. The New Jersey and Staten Island Ferry Co. *et al.*, *appls.*

Decided Jan. 25, 1876.

A court may fine a corporation for a violation of an injunction or order, although it may have been irregular.

Injunction orders must be honestly and fairly obeyed; persons bound to obey them may be guilty of violating them as well by aiding, abetting and countenancing others in violating them as by doing it themselves.

It is too late on appeal to make the objection that interrogatories had not been filed before the adjudication upon the contempt.

Where there was an order to show cause interrogatories were not necessary.

This action was brought to restrain the New Jersey and Staten Island Ferry Company from running a ferry from New York city to Staten Island without a license from plaintiffs, and to restrain the use of plaintiffs' wharf property for the purposes of such ferry. The day the suit was commenced (May 21, 1875) a preliminary injunction was granted restraining the use of the wharf for ferry purposes, and an order to show cause why such injunction should

not be continued during the pendency of the action. A motion was also made to enjoin the running of the ferry. These motions were granted June 15, 1875. An opinion was written which was read that morning by the defendants' attorney. It appeared the next morning in several newspapers, and certified copies of the formal order of the court were served on the defendants' attorney, and upon the pilot and engineer of the steamboat *D. R. Martin*, and on June 17th on P., the president of the company. After May 20, 1875, the point of departure of the *D. R. Martin* was changed, but she still continued to be used as a ferry boat, with the same master and time table, and still occupied plaintiffs' wharf at night time. On June 16th, at noon, a bill of sale was executed by the company to its president of the *D. R. Martin* for the consideration of one dollar, and June 19th a bill of sale was executed by the president to one B., the boat having continued to run as before. An order was granted for the company and its president to show cause why they should not be punished for contempt of court. The motion was granted and the company was fined for violating the first order, and the president ordered to be imprisoned for violating both orders.

Lyman Tremain, for respts.

Amasa J. Parker, for appls.

Held, No error. That the company and its officers were bound to obey the orders; that they were not void even if irregular (2 Green Ch. 456; 9 N. J. 263); that the company could be fined for violating the injunction; that the power to fine for disobeying its orders in such cases is inherent in a court of equity and is regulated by statute (2 R. S. 534; 1 2Abb. Pr. 171.)

Also *Held*, That the court was warranted from all the circumstances in finding that the sales of the ferry boat were not in good faith, and were intended as mere evasions of the orders of the court. That injunction orders must be honestly and fairly obeyed, and persons bound to obey them may be

guilty of violating them as well by aiding, abetting and countenancing others in violating them as by doing it directly.

The defendants claimed, on appeal, that interrogatories should have been filed by plaintiffs before any final adjudication upon the alleged contempt. The whole matter of the violation of the injunction order was submitted to the court upon the affidavits. No question was submitted as to the regularity of the practice.

Held, That the right to the interrogatories was waived, but that where there was an order to show cause it was not necessary to file interrogatories (1 Duer, 512; 5 id. 629; 14 Abb. Pr. 166; 37 N. J. 235; 1 Abb. Ct. Apps. Dec. 238).

Order of General Term affirming order of court below affirmed.

Opinion by *Earl, J.*

COVENANT. RIGHTS OF PARTIES IN EXCHANGE OF REAL ESTATE.

SUPREME COURT OF ERRORS, CONNECTICUT.

Ohas. W. Church v. Frederick C. Steele.

Decided February, 1875.

Where in exchange of real estate on the basis of an appraised amount per foot, there is a mutual mistake in the amount conveyed by one to the other, the injured party is entitled to recover at the appraised rate for the deficiency.

The same can be recovered in an action of assumpsit for lands sold.

Covenant broken, with a count in assumpsit for lands sold and conveyed.

On the 6th day of March, 1873, the plaintiff and defendant exchanged lots of land by them respectively owned in the city of Hartford, and each executed to the other a warranty deed conveying his lot.

Plaintiffs deed conveyed to defendant 100 feet on a street at \$81.30 per front foot, amounting to \$8,150.

Defendants deed called for and was supposed by both plaintiff and defendant to convey 280 feet on a street at \$27 per

front foot, amounting to \$7,641, the defendant paying plaintiff the difference, viz: \$593.

Afterwards the plaintiff, by measurement, ascertained that the lot conveyed to him by defendant was only 265 feet instead of 283 feet, defendant at the time of the exchange owning no more.

Held. Defendant had undertaken to pay plaintiff \$8,150, partly by means of this land at the agreed price of \$27 per front foot, and partly in money. For the purpose of ascertaining the money balance the defendant applied this appraisal to 280 feet. But subsequent measurement showed that it could have been applied to 265 feet only. This mutual mistake produced an erroneous result, the money balance paid was too small by the sum of \$486.

The interest of the parties will remain unfulfilled until the defendant supplies this deficiency.

Held, 2. The second count in the declaration is sufficient to support a judgment for the sum of \$486, representing the error resulting from the mutual mistake of the parties. As to sufficiency of first count no opinion expressed.

Pardee, J.

DAMAGES.

N. Y. COURT OF APPEALS.

Hoxter, resp't. v. Knox, app't.

Decided January 18, 1876.

In an action for breach of the covenants of a lease whereby the lessor covenanted to erect and give possession of the demised premises which were to be used for hotel purposes at a specified time, and for which the lessee then owned and had on storage furniture sufficient to fill, and the lessor failed to give possession, the lessee is entitled to damages based upon the value of the use of the premises as furnished for hotel purposes.

Under a lease providing that repairing shall be done by the lessor, the lessee, where the premises become untenable by reason of lessor's neglect, may

recover damages for the whole time they are untenable; he is not limited to the time within which such repairs might have been made, inasmuch as he was not bound, although he had the right to make them.

This action was brought by plaintiff to recover damages for the breach by defendant, his lessor, of various covenants in a lease of certain premises in New York city. The lease provided that defendant should complete a new building which he was to erect and give possession to plaintiff of the five stories above the ground floor on or before September 1, 1871; the defendant failed to do this. It appeared upon the trial that plaintiff, when the lease was executed, occupied the adjacent premises and a portion of the demised premises for hotel purposes, and that he had his furniture removed and stored while the new building was being erected.

The judge upon the trial ruled that plaintiff was entitled to recover for the breach of the covenant, the rental value of the use of the rooms in the new building for hotel purposes during the time he was deprived of their use, by the defendant's default, and instructed the jury, that as to such rooms as plaintiff had furniture for, he was entitled to damages based upon the value of their use as furnished rooms, and refused to charge that plaintiff could only recover the value of the use of the rooms unfurnished, or as defendant was to deliver them.

Samuel Hand & Stephen A. Walker, for resp't.

Wm. McDermot for app't.

Held, No error. That as both parties contemplated that the premises should be used for hotel purposes, an allowance of the rental value of the rooms in the new building during the time he was deprived of them through defendant's default based upon a consideration of the use to which they were to be applied subjected defendant to no greater liability than it may fairly be

supposed he intended to assume, and that the jury were properly instructed, that plaintiff was entitled to recover the value of the use of furnished rooms so far as he was prepared to furnish them with the furniture stored; that the loss of the use of the furniture from delay in completing the new building, was the natural result of defendant's failure to perform his covenant, and it might be justly presumed to have been contemplated by defendant when the lease was made. 35 N. Y. 269.

Defendant also covenanted in the lease to make certain specified alterations and repairs to a part of the premises, which included repairs of broken ceilings and of the roof so as to make it water tight. After the time when the repairs were to have been completed defendant had a balustrade removed from the building, and in doing this holes were made in the tin covering of the roof through which water afterwards penetrated, and rendered the rooms in the upper story uninhabitable, and caused the ceilings to crack and break so that quite extensive repairs were necessary. Plaintiff repeatedly notified defendant that these repairs were needed, and after waiting six weeks made them himself. Defendant asked the court to charge the jury that plaintiff could only recover for the use of the rooms such time as it would necessarily take to repair them, and that if plaintiff knew of the defect, he was bound to have it repaired as soon as it could reasonably be done. The court refused both of these requests.

Held, No error; that plaintiff when defendant failed to make the repairs had a right, but was not bound to make them. 35 N. Y. 269.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Andrews, J.*

DESCRIPTION IN DEED. BOUNDARY LINES. EASEMENT.

N. Y. COURT OF APPEALS.

White's Bank of Buffalo, v. Nichols.

Decided February 1, 1876.

A grantee claiming under a deed describing the land as commencing at the intersection of the exterior lines of two streets takes only to such exterior lines; the point thus fixed is as controlling as any monument would have been, and necessarily excludes the soil of the street.

Where the grant contains no evidence that the parties contemplated a shifting boundary, the fact that the street is subsequently narrowed so as to remove its exterior line towards its centre, does not enlarge the area of the lots granted; their lines are fixed permanently, and cannot be changed to conform to any altered condition or circumstances.

The presumption is that the grantor does not intend to retain the fee of the soil of the street, but such presumption may be overcome by the use of any terms in describing the premises granted which may indicate an intent not to convey.

What will not exclude from the operation of a grant the soil of the street, stated.

Nothing short of an intention to abandon an easement will operate to extinguish it, unless other persons have been led by the acts of the owners of the easement to treat the servient estate as if free from the servitude.

This was an action of ejectment to recover possession of a strip of land twenty feet wide, on Garden street, in the city of Buffalo. Both parties appealed from the judgment of the Supreme Court, each claiming to be entitled to the sole and exclusive possession and beneficial enjoyment of the premises. The court below adjudged the plaintiff to be the owner in fee, and the defendant to be entitled to an easement in the premises, to wit, a right of way over it. The parties from

whom plaintiff and defendant claimed to derive title, owned a large tract of land in the city of Buffalo, which they divided into lots, making a map thereof, upon which was designated a street called Garden street, sixty-three feet wide, and conveyed several lots to different grantees, with reference to the map. The grant under which defendant claimed title described the premises as commencing at the intersection of the exterior lines of two streets, of which Garden street was one. In February, 1869 the city ordered Garden street to be staked out, and its boundaries recorded, and this was done, showing it as a sixty-three feet street. In July and August, 1869, the street was duly contracted by the city to the width of twenty-three feet, leaving the centre line as before. Defendant claimed to own the fee to the centre of the street, subject to an easement in favor of the grantees of the other portions of the tract and the public in the street as laid down on the map, and that he owned the twenty feet taken from the width of the street, divested of the easement.

S. S. Rogers for resp'ts.

J. A. Allen for appt.

Held, That the description in the deed under which the defendant claimed necessarily excluded the soil of the street; that the point of starting, in the description, is as controlling as any monument would have been, and must govern the other parts of the description, and the lines of the granted premises must conform to the point thus designated, so as to connect thereat, and therefore the judgment was correct.

No particular words or form of expression are necessary to restrict a grant to the exterior line of a street or margin of a stream, but while the presumption is that the grantor does not intend to retain the fee of the soil within the lines of the street or under the water, such presumption may be overcome by the use of any

terms in describing the premises granted, which clearly indicate an intent not to convey the soil of the street or stream.

It is not sufficient to exclude from the operation of the grant the soil of the street or stream, that it was made with reference to a plan annexed, the measuring or coloring of which would exclude it, or by lines and instruments that would only bring the premises to the exterior line of the highway, or that they are bounded generally by the line of the highway or along it. Although the highway is in one sense a monument, it is regarded as a line, and the centre is regarded as the true boundary until by apt words the intent to make the exterior line the boundary is shown. 10 C. B. N. S., 400; 50 N. Y., 694; 36 id., 120; 23 id., 61; 2 Wall, 57.

Also Held, That the lines of defendant's grant are fixed and permanent, being established in reference to the circumstances then existing, and cannot be changed to conform to any altered condition or circumstances, in the absence of evidence in the grant that the parties contemplated a shifting boundary, or any change in the lines or increase of the area of the lot granted, or to provide for any change in the line or width of the street, as the same should be adopted or used by the public. 31 Conn., 165; 18 Wis., 35; 2 Wall, 57; 52 Me., 566; 1 Whart., 323; 58 N. Y., 437, and that therefore the change in the street did not extend defendant's title to the new exterior line.

It appears that before this action was brought defendant had fenced in the *locus in quo*, and plaintiff claimed that by so doing, and by claiming to own the fee, he had abandoned the easement.

Held, That this act did not indicate or tend to prove an intent to abandon the easement. 22 N. Y., 217; 100 Mass. 491; 7 Exch., 838; 14 M. & W., 789; 3 C. B. N. S., 120.

Nothing short of an intention to aban-

don an easement will operate to extinguish it, unless other persons have been led by treat of the owner of the easement to treat the servient estate as if free of the servitude. 8 E. & B. 31.

Corning v. Gould, 16 Wend., 531, and Oraine v. Fox, 161 Barb., 184, distinguished.

Plaintiff was not, as against defendant, entitled to a judgment without qualification, and which might be held to destroy the easement. A judgment for the possession, subject to the easement, gave it all to which it was entitled.

Judgment of General Term, modify judgment at circuit by making plaintiff's title subject to the easement of defendant, affirmed.

Opinion by *Allen, J.*

EJECTMENT. EXCEPTION.

N. Y. SUPREME COURT—GENERAL TERM
FOURTH DEPT.

Stewart, *resp't* v. Patrick, *applt.*

Decided January, 1876.

A line between adjoining owners located and recognized as such for 20 years becomes a fixed boundary.

Judge's charge must be excepted to in order to bring same up for review.

Appeal from Judgment upon a verdict at the Circuit in favor of the Plaintiff.

This is an action of ejectment brought to recover a small strip of land in the possession of the defendant, and involves the question of a disputed boundary between the parties in respect to two adjacent village lots in the village of Herkimer.

The case was put to the jury upon the question whether the line which the plaintiff claimed to be the true line had been practically located and recognized as the line between the parties for 20 years and upwards, and they were instructed if that were so "it put an end to the case, and the plaintiff was entitled to recover according to his occupation for 20 years."

Geo. M. Smith for *applt.*

Abner H. Prescott for *resp't.*

Held, The principle of law asserted in the charge, in this particular, is a sound and correct one; and, if it were not, no exception appears to have been taken to it by the defendant's counsel. The appeal is from the judgment, which only brings up for review the exceptions taken at the trial.

Judgment affirmed.

Opinion by *E. Darwin Smith, J.*

ESTOPPEL. CONSIGNMENTS.

N. Y. COURT OF APPEALS.

Brown *resp't* v. Combes *et al.*, *appls.*

Decided Jan'y 18, 1876.

One who advances money on growing crops, and afterwards receives them, under an agreement that he shall consign them for sale, is entitled to the proceeds as against the consignees, notwithstanding the consignees claimed under an older title from the original vendor, of which he had no notice.

The consignees having received the crops from the consignor, under a notice that they were to be sold for his account, are estopped from setting up that they were to be made upon any other account.

This action was brought to recover a balance due on account, for goods consigned to defendants for sale. It appeared that plaintiff agreed with one O. to make advances on his growing crops, which were to be shipped to him at S., and by him consigned to defendants and others, for sale. Plaintiff made the advances; O. received the crops and consigned them as agreed, with bills of lading in plaintiff's own name, and letters were written by him to defendants from time to time, directing them to sell on his account. Defendants offered to prove upon the trial an agreement between O. and them of the previous year, by which they were to advance money for the crops, and which

was to continue in force until a final settlement was had, and all allowances paid, and that they had made advances thereunder. Plaintiff did not know of this agreement.

Simeon E. Church, for applts.

W. W. Goodrich, for resp't.

Held, That plaintiff by his advance became possessed of the crops, and was entitled to the proceeds of the sale of them; that the prior agreement with defendants did not alter plaintiff's rights, as he had no notice of it, and had full possession of the crops; that defendants could not claim the crop under an older title, as they were not sold or delivered to defendants, but shipped on behalf of plaintiff, with a notice to that effect.

Defendants claimed that notice of their claim was given in a letter to plaintiff in answer to a letter from him complaining of delay, which stated that plaintiff could change his consignments if he would pay the amount defendants had advanced to O. To this plaintiff replied, that as he had made the shipments in his own name, he supposed defendants could have no doubt who was entitled to the returns, and that he sent other articles for defendants to sell on his account. Defendants continued to sell the crops on plaintiff's account, which were forwarded with bills of lading in plaintiff's name.

Held, That plaintiff's reply to defendants' letter was a direct notification to them that the sales were made for plaintiff, and they are estopped now from claiming that they were made upon any other account.

Held, also, That as the case appears to have been tried upon the theory that the balance claimed by plaintiff was actually due unless defendants were entitled to deduct their advances to O. of the previous year, although no proof was given that there was anything due plaintiff, defendants are concluded from raising the question here.

Judgment of General Term affirming judgment entered on verdict directed for plaintiff, affirmed.

Opinion by *Miller, J.*

EVIDENCE. VOLUNTARY STATEMENT.

N. Y. COURT OF APPEALS.

Murphy, plaintiff in error v. The People, defendants in error.

Decided January 18, 1876.

Upon the trial of an indictment for murder, it is competent for the prosecution to show, as bearing upon the question of motive, that deceased had attended Court several times with a party against whom the prisoner was prosecuting several suits, and the objection that parol evidence of the nature of the suits could not be given is not available on appeal.

A statement made by the prisoner, shortly after the murder, and while he was in custody of the Sheriff, in response to the question, "do you desire to make any statement," is voluntary.

The plaintiff in error was convicted of the murder of one H., by the firing of a gun or pistol. The evidence was entirely circumstantial, and tended to show that the shot was fired by some one standing outside of the house in which the deceased and one G., the prisoner's brother-in-law, resided, and near a window of a room in which they were sitting. Upon the trial G. was produced as a witness for the people, and testified, among other things, that he was the defendant in three suits commenced by the prisoner against him and others, and had been several times to attend the trial of them, and that H., the deceased, had accompanied him, and that the suits were brought to set aside deeds from his wife to him. It appeared that the witness' wife was dead, and that the suits were to be tried on the Monday after the murder. This evidence was objected

to generally by the prisoner's counsel, and the objection was overruled.

James Emott and H. Daily, Jr., for plaintiff in error.

Seth B. Cole for defendants in error.

Held, no error; that the evidence was competent as bearing upon the question of motive; that it was always competent upon such a trial to show the relations between the prisoner and the persons against whom the murderous act was directed; that the objection having been made generally, the objection that parol evidence could not be given of the suits, and that the pleadings should have been produced, is not available on appeal; that the objection should have been specifically made upon the trial. 17 Wend, 257; 3 N. Y., 243; 12 id., 442; 32 id., 440; 45 id., 753; 50 id. 392.

The prosecution proved that the prisoner, when brought to the Sheriff's office, on the day after the murder, was asked if he desired to make any statement of his "whereabouts on Sunday and Saturday," and upon being informed that if he desired to do so the statement would be reduced to writing for him, and the prisoner replied that he did, and then proceeded, without any further request, to make a statement. This statement was offered in evidence and received under objection by the prisoner that it was not voluntary.

Held, no error; that the statement was not to be so considered simply because made after the prisoners' arrest to the officer who had arrested him, and while in his actual custody. 15 N. Y., 9; 37 id., 303; 10 id., 13; 15 id., 384; 41 id., 9. It was for the jury to determine the weight to be given to the statement, taking into consideration the circumstances under which it was made. Evidence was received under objection which showed that after the murder, and on the same evening, a mark was found under the window where the shot was fired, and that during the

conversation between the officer and the prisoner, when he made his statement, the prisoner was asked "where did that mask come from," and replied, "the children got that from the ragamuffins," and immediately added, as if recollecting himself, "that mask had a black nose and was torn down the face." The prisoner's counsel moved to have this testimony stricken out, "as not having been connected with the prisoner," and the motion was denied. The fact that a mask had been found had not been communicated to the prisoner when the conversation occurred.

Held, no error; that the reply of the prisoner indicated that he knew that a mask was in some way connected with the transaction, and that it was proper to show the conversation as tending to connect the prisoner with the mask found on the night of the murder.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Andrews, J.*

FAILURE OF CONSIDERATION. SALE OF NEGOTIABLE BONDS.

U. S. SUPREME COURT.

Otis, et al., plaintiffs in error, v. *Cullum, receiver, &c., defendant* in error.

Decided October Term, 1875.

In the absence of fraud or warranty, the vendor of negotiable town bonds, which, after the sale, are declared void by the courts, is not bound to repay to the vendee the purchase price.

In error to the Circuit Court of the United States for the District of Kansas.

The Legislature of Kansas passed two acts under which the City of Topeka was authorized to issue bonds for certain specified purposes, the amount in each case to be within the limit prescribed. A hundred

coupon bonds of one thousand dollars each, payable to a party named or bearer, were executed and delivered to that party. They became the property of the First National Bank of Topeka. That bank put them upon the market and disposed of them. Eighteen of them were sold to the plaintiffs in error for the sum of \$12,852, and the residue to another party. There was default in the payment of interest. The other party brought suit. This court held that the Legislature had no power to pass the acts, and that the bonds were, therefore, void. (*Loan Association v. Topeka*, 20 Wall. 655.) This suit was brought by the plaintiffs in error to recover from the receiver the amount paid to the bank for the eighteen bonds, with interest upon that sum. The ground relied upon is failure of consideration. The good faith of the bank was conceded, as also that there was no warranty.

Held, The plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume.

Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries.

It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principles which the plaintiffs in error insist shall be applied in this case. (*Lambert v. Heath*, 15 Meeson & W. 486.)

Judgment affirmed.

Opinion by *Swayne, J.*

FRAUDULENT PURCHASER. EQUITABLE RELIEF.

UNITED STATES SUPREME COURT.

Neblett v. Macfarland.

Decided October Term, 1875.

In setting aside a conveyance procured by fraud, equity will allow the purchaser to receive back only the identical property by which he effected the bargain, whether it has greatly depreciated in value or not; and even if it has become worthless.

This action was brought to set aside the conveyance of a plantation in Louisiana, made by Macfarland to the appellant Neblett, upon the allegation that the conveyance was obtained by the fraudulent acts and representations of Neblett and his father.

The only consideration given, or professed to be given, by Neblett for the conveyance was the cancellation of a certain bond for the sum of \$14,464.51, executed by Macfarland to Sterling Neblett, the father, and alleged to be the property of Henry Neblett.

The Court below adjudged the transaction to be fraudulent, directed the execution of a deed reconveying the property, and ordered the return and re-delivery of the bond for \$14,464.51, unaffected by any endorsement of credit or payment thereon, and the same, with the mortgage made for its security, to retain the same lien thereon and the same force and effect as if the deed had not been made or any cancellation of the bond taken place.

It was claimed that, instead of directing a return of the bond in specie, as a condition for the return of the land, the court should have directed the payment of the amount of the money secured thereby.

Held, 1. In cases of this character the general principle is that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court

proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction.

But this principle will not benefit the complaining party in this suit.

He is restored here to his property that he had and parted with when he received his deed, to wit, his bond and mortgage. If he had paid \$14,500 in money and received in return only a bond for the like amount, of doubtful security and impaired by the lapse of time, he might well have complained. But he paid no money.

Whether good or bad, he receives now the same security that he gave to his vendor. It would be a perversion of justice to give him the full amount in money for a security then worth but fifty cents on the dollar. If, on the other hand, it was then an adequate security, it is the same now.

2. It is no objection to a restoration of property received on a fraudulent sale that it has fallen in value since the date of the transaction.—(Blake v. Morrell, 21 Beavan, 613; Veazie v. Williams, 8 How., 134, 158.) Nor if the property is of a perishable nature, is the holder bound to keep it in a state of preservation until the bill is filed.—(Scott v. Perrin, 4 Bibb, 360; Kerr, 337).

A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing his bill.—(Same auth.) Nor is it fatal to his right of rescission that some of the shares have been thus forfeited.

We have no means of knowing whether there can be a defence made to the bond, arising from the statute of limitations. But of this the appellant must take his chance. If the bond has become thus impaired it is no worse than the loss of a perishable article, or a forfeiture of shares during the litigation. These circumstances do not alter the rule of law. In Gatley v. Newell,

supra, it is said: "The party defendant is not bound to rescind until the lapse of a reasonable time after discovering the fraud. Hence the parties cannot be placed in *statu quo* as to time."

Judgment affirmed.

Opinion by *Hunt, J.*

INSURANCE.

CONN. SUPREME COURT OF ERRORS.

Continental Life Insurance Co. v. Benjamin H. Palmer and others.

Decided February 1875.

A wife insured the life of her husband, the amount payable to herself if living, if not, to their children. She died before her husband, and one of the children before him, leaving a child.

Held, that a transmissible interest vested in the children upon the issuing of the policy, and that the child of the deceased child took by descent the interest of its parent, and was entitled to the portion of the fund which the parent would have received if living.

Plaintiffs brought bill of interpleader against certain parties claiming interest adversely to each other, in the amount of a life insurance policy payable by petitioners. It was found upon the petition and answer that Betsy A. Palmer insured the life of her husband, Benjamin W. Palmer, in the sum of \$3,000, payable to herself, if living, if not, to their children. She died before her husband. Amos F. Palmer, one of the children, also died during the life of his father, leaving issue, Charles P. Palmer, one of the respondents.

That on death of Benjamin W. Palmer there was due and payable on policy the sum of \$2,826.79 cents, which petitioners were ready and willing to pay to the persons entitled to receive same.

The question here being whether Chas. P. Palmer takes an interest in the policy, or whether the whole sum insured vests in the surviving children.

Held, Amos F. Palmer, at the time of his decease, had an interest in this policy which was transmissible by descent; and consequently, that the respondent, Chas. P. Palmer, was entitled to that portion of the fund which his father would have taken if living.

The moment this policy was executed and delivered, it became property, and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested then in *all* or in a *part* of the payees. The payees consist of two parties, the wife, and the children. As only one could take and enjoy the property ultimately, it did not vest in all as tenants in common; nor did it vest in either so as to give a right to the present enjoyment of it. It was not, however, a mere expectancy, nor a naked possibility, but it was a possibility coupled with a present interest. It was visible, tangible property, and, like any other insurance policy, it was capable of assignment, and had an appreciable value. Each party took a conditional, not an absolute, right to the whole policy. It was not a condition precedent, but subsequent. The title vested in point of right immediately, but was liable to be divested upon the happening of a subsequent event. The right to the policy, in a strict sense, was not contingent; the possession and enjoyment of the fund thereby created were postponed to the future, and were contingent. This contingency applied to both parties—to the wife as well as to the children. Her enjoyment of the fund depended upon her surviving her husband; the children's, upon her husband's surviving her. In respect to each, it was a then present right to the future enjoyment of property, but it was liable to be defeated by a subsequent contingency, and was certain to be defeated as to one of them. That such a right is recognized as property and is transmissible to heirs, is a proposition abundantly established by the authorities.

Winslow v. Goodwin, 7 Met., 363; *Weale v. Lower*, Pollexfen 54; *Anonymous*, 2 Vent., 347; *Pinbury v. Elkin*, 1 P. Wms., 563; *Chauncey v. Graydon*, 2 Alk., 616; *Hodgson v. Rawson*, 1 Ves., 46; *Barnes v. Allen*, 1 Brown O. C., 181; *Jones v. Roe*, 3 Term R., 88; *Fearne on Remainders*, 364; 4 Kent's Com., 261.

Our own Court has applied this doctrine to a life insurance policy like the one in the case at bar, and held that an interest vests in the payee during the life time of the person whose life is insured, so as to be the subject of testamentary disposition, notwithstanding such interest is liable to be defeated by a subsequent contingency. *Keller v. Gaylor*, 40 Conn., 343; *Conn. Mutual Life Ins. Co. v. Burroughs*, 34 Conn., 305; *Chapin v. Fellows*, 36 Conn., 132.

We are therefore of opinion that Amos F. Palmer, at the time of his decease, had had an interest in this policy, which was transmissible by descent, and consequently that the respondent, Charles P. Palmer, is entitled to that portion of the fund which his father would have taken if living.

Opinion by *Carpenter, J.*

INSURANCE.

N. Y. COURT OF APPEALS.

Blossom, resp't., v. *Lycoming Fire Insurance Co.*, *appts.*

Decided February 8, 1876.

A substantive compliance with conditions of policy as to proof of loss, unless waived, is necessary to entitle the insured to recover.

The company may reject a claim on the two-fold ground that the proof of loss was too late, and that the insurance was fraudulently obtained; it is not bad for duplicity.

This action was brought upon a policy of insurance which contained a clause that, in case the premises were destroyed by fire, proof of loss must be furnished within thirty days thereafter. The property was de-

stroyed Nov. 29, 1870. No communication, direct or indirect, took place between plaintiff and defendant, or its agents, until in April following, when proof of loss was forwarded. Defendant's agent wrote to the attorney for the plaintiff that the proof of loss was too late, that it should have been made within thirty days after the fire, and that the claim was fraudulent. The judge charged the jury that if they believed from this letter that defendant intended to waive and did waive the proof of loss, and considered the case upon its merits in regard to its being fraudulent, then plaintiff would be entitled to recover, otherwise not.

G. W. Hotchkiss, for resp.

O. W. Chapman, for applt.

Held, Error. That a substantial compliance with the condition of the policy as to proof of loss was necessary to entitle plaintiff to recover, unless waived by the defendant (52 N. Y. 502; 57 id. 500); that the taking of another and distinct objection in the letter from defendant's agent was not a waiver of the objection that plaintiff had failed to furnish proof of loss within the time required; that the objections were not bad for duplicity, and neither operated to annul or destroy the other.

It appeared that K., defendant's adjuster, visited the premises unknown to plaintiff and made inquiries into the circumstances of the fire, that he did this without authority or direction from defendant, and that he did not intimate that defendant would or was liable to pay the loss, or that the loss was recognised by defendant as a valid claim.

Held, That had plaintiff known of this visit of K., it could not have legitimately influenced his action or omission to act in respect to the proof of loss.

Judgment of General Term on order denying motion for a new trial and directing judgment on verdict reversed and new trial granted.

Opinion by *Allen, J.*

JOINT UNDERTAKING.

NEW YORK SUPREME COURT—GENERAL TERM, FIRST DEPARTMENT.

Grace R. Vanderlip, *plaintiff and appellant* v. Henry Keiser *et al.*, *defendants and respondents*.

Decided January 28, 1876.

In an action against several defendants for a balance upon an alleged account stated, it must be proved that there was a joint undertaking on the part of all the defendants to pay the amount of such balance.

Appeal from judgment entered on the report of a referee dismissing the plaintiff's complaint with costs.

This action was brought by the plaintiff upon a claim assigned by the firm of Vanderlip & Taylor to recover from the defendants jointly the sum of \$3,000 upon an account stated, the same being for money advanced for and in behalf of defendants by the firm of Vanderlip & Taylor. The answer put in issue all the facts alleged in the complaint.

It appeared on the trial that at the time of the death of Mrs. C. K., the mother of the defendants, in 1867, there was on deposit to her credit with the firm of Vanderlip & Taylor a considerable sum of money. After the death of their mother, the children, who are the defendants in this action, deposited money, from time to time, with Vanderlip & Taylor, which was carried to the credit of Mrs. C. K.—s account. This account, after being kept for some time in the name of Mrs. C. K., was changed to the name of the estate of C. K.; afterwards the account was changed to the name of Henry Keiser, trustee.

Subsequently Mr. A. J. Metz, the husband of the defendant, Mary E. Metz, one of the defendants, appears to have been authorized to act as the agent of the defendants, but it is not shown what was the nature or extent of the agency, nor is there anything to justify the inference that any of the defendants conferred upon

Mr. Metz any authority to state an account as upon a joint liability. In the course of Mr. Metz's agency, he applied to the firm of Vanderlip & Taylor to advance the sum of \$9,000, which was required to satisfy a mortgage due by the estate of Mrs. C. K., and the money was advanced by the firm, although in doing so the account was largely overdrawn, as stated by Mr. Metz at the time. This payment was undoubtedly made to Metz for the purpose of satisfying the mortgage, with the knowledge and sanction of all the defendants, and enured to their benefit, about \$6,000 of the amount, however, was money held by V. & T. The complaint was dismissed on the ground that no joint liability was established.

Held, That the right of the plaintiff to recover depended upon a joint undertaking by defendants to pay the balance shown by an alleged account stated. That the view of the referee, that upon the evidence no joint undertaking is shown, is entirely correct.

The alleged advance to all the defendants to discharge a mortgage affecting property in which they had a joint interest was a balance made up from the consideration of various deposits with the firm of V. & T., in which the defendants had no joint interest, but separate and different interests. No joint undertaking being shown, the judgment should be affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

JURISDICTION. REVIEW OF DECISION OF STATE COURT.

U. S. SUPREME COURT.

Bolling, plaintiff in error v. Lersner, defendant in error.

Decided October Term, 1875.

This Court cannot re-examine the judgment or decree of a State Court simply because a Federal question was presented to that Court for determination. It must appear that such a

question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

In error to the Supreme Court of Appeals of the State of Virginia.

The Circuit Court of Fauquier County, Va., rendered a decree in this cause September 13, 1867. From this decree Lersner prayed an appeal to the District Court of Appeals, May 17, 1869. This was allowed by W. Willoughby, Judge. Upon this allowance the appeal was docketed in the Appellate Court, and the parties appeared without objection or protest and were heard. Upon the hearing the decree of the Circuit Court was reversed and the cause remanded with instructions to proceed as directed. When the case came to the Circuit Court upon the mandate of the Appellate Court, Bolling appeared and objected to the entry of the decree which had been ordered, for the reason, among others, that Willoughby, the Judge who allowed the appeal, had been appointed to his office by the commanding general exercising military authority in Virginia under the reconstruction acts of Congress, and that those acts were unconstitutional and void. This objection was overruled and a decree entered according to the mandate. From this decree Bolling took an appeal to the Supreme Court of Appeals, where the action of the Circuit Court was affirmed. To reverse this decree of affirmance the present writ of error has been prosecuted.

Held, Bolling presented to the Court for its determination the question of the constitutionality of the reconstruction acts. This was a Federal question, but the record does not show that it was actually decided, or that its decision was necessary to the determination of the cause.

The case might have been disposed of in the State Court without deciding upon the constitutionality of the reconstruction acts. Thus, if it was held that the objection to the authority of the Judge came too late, or that the allowance of an appeal a

by a Judge *de facto* was sufficient for all the purposes of jurisdiction in the Appellate Court, it would be quite unnecessary to determine whether the Judge held his office by a valid appointment. We might, therefore, dismiss the case because it does not appear from the record that a decision of the Federal question was necessary.

But we find that the Federal question was not decided. All the Judges agreed that Willoughby was a Judge *de facto*, and that his acts were valid in respect to the public and third parties, even though he might not be rightfully in office.

Dismissed for want of jurisdiction.

Opinion by *Waite, C. J.*

LEASE.

U. S. SUPREME COURT.

Charles Stott, et al., *ptfs in error*, v. William Rutherford.

Decided October Term, 1875.

An action may be maintained in their individual names by a church committee upon a lease executed by them as a committee.

A lessee cannot dispute his lessor's title.

In error to the Supreme Court of the District of Columbia.

This is an action of covenant brought upon an indenture of lease executed by the plaintiffs in error and one P. D. Gurley, since deceased, to the defendant in error. The declaration sets out sundry breaches of stipulations contained in the lease. The defendant plead *non est factum* and satisfaction of the claim of the plaintiffs by payment.

On the trial he objected to the admission of the lease in evidence, upon the ground that it showed upon its face that the lessors had no title to the premises, and that the instrument was, therefore, a nullity. The Court admitted the evidence, and an exception was regularly taken.

A verdict was rendered for the plaintiffs. The defendant moved for a new trial, and the case was heard by the full court in general term. That court ordered a judgment to be entered for the defendant, *veredicto non obstante*.

The lease created a term beginning on the 1st day of February, 1864, and to continue five years. It recites that the lessors, in making the lease, "were acting as a church extension committee, by authority and on behalf of the General Assembly of the Presbyterian Church, Old School." The leasehold premises are described as "being lot number four and part of lot number five," &c., "as now held by the parties of the first part," &c. The lessee covenants, among other things, "that he will well and truly surrender and deliver up the possession of said premises to the said parties of the first part, their successors and assigns, in accordance with the stipulations herein contained, whenever this lease shall terminate."

There are two answers to the defence relied upon in this case.

Held, 1. The recital in the lease as to the character in which the lessors acted, and all that is said upon the subject in the bill of exceptions, are not inconsistent with their holding the legal title in trust to enable them the better to discharge the duties touching the property with which they were clothed.

2. We think the principle that the lessee cannot dispute the title of his lessor also applies. We see nothing to take the case out of this long settled and salutary rule. The rule applies with peculiar force where the lessor was in possession and transferred that possession upon his faith in the validity of the lease to the lessee.

Judgment for plaintiff in error.

Opinion by *Swayne, J.*

LEASE. RENT. SURRENDER.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Philander W. Fobes v. Edward H
Lewis.

Decided January, 1876.

*Acceptance of new tenants operates as
a surrender of a lease.*

This action was brought for two months' rent.

Plaintiff had leased certain premises to defendant. Defendant occupied or could have occupied same. At the end of two months the plaintiff rented the premises to other parties, who went into possession.

The plaintiff was non-suited.

E. Forman for plttf.

Gray & Costellar for deft.

Held, The non-suit was erroneously granted. The defendant was clearly liable for two months' rent. The acceptance by the plaintiff of other tenants at the expiration of the two months was equivalent to the acceptance of a surrender of the lease by the defendant, and discharged him from the payment of rent afterwards.

The order denying the motion for a new trial, and the judgment should be reversed, and a new trial granted with costs to abide the event.

Opinion by *E. Darwin Smith, J.*

LEASE. RENEWAL. REPAIRS.

N. Y. SUPREME COURT—GEN'L TERM.
FOURTH DEPT.

Smith v. Farnsworth.

Decided January, 1876.

Where a lessee agrees to and does make repairs, under an agreement with the lessor that his lease shall be renewed and the amount expended in repairs shall be applied to the rents, and the demised premises are destroyed before the commencement of the new term and before the new lease is delivered, he may

recover the amount as expended in repairs.

Plaintiff rented of defendant a store in the Village of Avon for the term of two years, payable quarterly in advance. Prior to the termination of his lease the building was destroyed by fire.

Before the destruction of the building plaintiff and defendant made a verbal arrangement by which plaintiff was to have a lease of the store for the term of two years from and after the expiration of the then existing term. Defendant agreed to make certain repairs on the store to the amount of \$250, and this sum was to apply on the rent under the new lease. The rent was to be the same under the new as under the old lease.

Plaintiff made the repairs to the said amount of \$250, but defendant did not give any new lease, and after the property was destroyed defendant sold the property to another party.

Plaintiff was non-suited.

Held, That the consideration for making the repairs was the lease thereafter to be made. The destruction of the store rendered a lease for another two years valueless, and in this view of the effect of the fire the defendant acquiesced as he did not make a new lease or even offer one to the plaintiff.

That, the consideration for the repairs having failed, plaintiff could recover what they were worth, and the fact that the repairs were to apply on the lease in payment of rent made no difference.

That the repairs were in legal intentment money, and when recoverable at all could be recovered as money. By the repairs when completed the value of defendant's property was increased without any benefit to the plaintiff, although made at his expense.

Non-suit set aside and a new trial granted.

Opinion by *Mullin, P. J.*; *Smith* and *Gilbert, JJ.*, concurred.

NEGLIGENCE. DAMAGES.

U. S. SUPREME COURT.

The M. & St. P. R. R., *plaintiff in error v. Mary Arms, defendant in error.*

Decided October Term, 1875.

In an action to recover for injuries resulting from negligence, whether gross or ordinary, exemplary damages are not allowable.

Error to Iowa Circuit Court.

Action to recover damages for injuries received by reason of a collision on defendant's road. Plaintiff was a passenger on defendant's train, which was running about fifteen miles an hour, when it collided with an engine on the same track. The jar occasioned by the collision was light, and more of a push than a shock. Plaintiff was thrown from her seat and sustained the injuries of which she complained. The Court charged: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages." Verdict for \$4,000.

Held, Error; the absence of the care necessary to avert an accident, whether called gross or ordinary negligence, did not authorize the jury to visit defendant with damages beyond the limit of compensation for the injury inflicted. To do this there must be some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences.

Judgment reversed.

Opinion by *Davis, J.*

NEGOTIABLE PAPER.

SUPREME COURT OF PENNSYLVANIA.

First National Bank of Clarion, *pl'ff in error v. Gregg, def't in error.*

Decided January 6, 1876.

A party taking a note as collateral security for a precedent debt, without making any advances or giving any new credit

thereon, is not a bona fide holder for value.

Error to Clarion Common Pleas.

The defendant in error endorsed to Brady & Co., a promissory note for collection. B. & Co., being indebted to the plaintiff in error transferred the note to it as additional security. Plaintiff in error made no advances and gave no new credit to B. & Co., on the strength of the note.

The plaintiff in error, collected the amount of the note from the maker. This action was brought to recover the proceeds, and defendant in error had judgment.

Held, That inasmuch as Brady & Co. did not acquire title by the endorsement for collection, they had no right to pledge it, or to direct that its proceeds be placed to their credit in payment of their indebtedness; that, although the bank, in the absence of notice, had a right to treat B. & Co. as the owners of the note, yet, not having made any advances or extended any new credits upon the faith of it, it clearly has no equity which entitles it to withhold the proceeds from the real owners.

Judgment affirmed.

Opinion by *Williams, J.*

POWER OF ATTORNEY. PRESUMPTION.

U. S. SUPREME COURT.

Alfred H. Clements, *applt.*, v. Joseph P. Macheboeuf *et al.*, *respts.*

Decided October Term, 1875.

A deed of conveyance executed under a power of attorney, and apparently within its scope, is presumed to be valid.

Appeal from the Supreme Court of the Territory of Colorado.

Fee simple title to the lands described in the bill of complaint was vested in the complainant by virtue of a patent from the United States. Twelve or more persons are named in the bill of complaint as

the principal respondents in the suit, and the complainant alleges that one James Hall, pretending to act in his behalf as his attorney in fact, on the several days mentioned in the bill of complaint, without any authority whatever, conveyed by deeds of warranty certain portions of said lands, as therein described, to each of the several respondents named in the bill of complaint, and the charge in effect is that the several respondents, as such grantees, had full notice that the person pretending to be the agent of the complainant acted in making the said several conveyances without any authority whatever from the complainant, and that the respondents combined with the pretended agent to cheat, wrong and defraud the complainant out of his title to said lands, and still refuse to restore him to his just rights. Wherefore the complainant prays that the several deeds executed by the said pretended agent to the said several respondents may be decreed to be cancelled, and that the lots may be returned to the complainant wholly discharged from all subsequent conveyances executed by such grantees, and for general relief.

The respondents filed several answers, setting up substantially the same defense. They admit that the complainant was the owner of the lands in fee simple, and that certain portions of the same were conveyed to them by the person professing to act as the agent of the complainant, as alleged in the bill of complaint, but deny that the person who executed the respective conveyances acted without authority from the complainant, or that they ever combined with that person to cheat, wrong or defraud the complainant, as alleged in the bill of complaint. Instead of that the respective respondents allege that the agent named, by virtue of the powers of attorney annexed to the answer, or by virtue of one or both of the same, conveyed to them respectively the certain lots or portions of said lands for a valuable consideration, as more particularly described

in the bill filed by the complainant.

The complainant filed a general replication and proceeded to take proofs. Among other things he introduced the patent from the United States, and the deposition of Caleb B. Clemens, his father, and the master, appointed to take testimony, annexed to his report to the court the two exhibits attached to the answers of the respondents. No proofs were introduced by the respondents. They rested the case upon their deeds of conveyance and on the powers of attorney annexed to the answers.

The authority conferred was sufficient to warrant the agent to execute the deeds, and there was nothing in them inconsistent with the power of attorney given him by the complainant. Complainant gave no proof of fraud.

Held, That the deeds of conveyance show on their face that they were executed within the limitations of the power of attorney, and in such case the presumption is that the trust reposed in the attorney was executed in good faith. Where the deed in such case is apparently valid, courts of justice will not infer anything against its validity. (*Very v. Very*, 18 How. 360.)

The rule is that if the deed is apparently within the scope of the power the presumption is that the agent performed his duty to his principal. (*Morrill v. Cone*, 22 How. 82; *Doe v. Martin*, 4 Term, 39; *Rail v. McKernan*, 21 Ind. 421; *Wilburn v. Spofford*, 4 Sneed, 704; *Marr v. Given*, 23 Me. 55.)

Facts will not be presumed against a deed of conveyance which on its face has all the legal requisites to make it a valid instrument. (*Rurr v. Galloway*, 1 McLean, 496.)

Instead of that the rule is that he who would invalidate such a deed must impeach it by affirmative proof. (*Polk v. Wendal*, 9 Cr. 87; *Bagnal v. Broderick*, 13 How. 450; *Minter v. Crommelin*, 18

id. 87; Bank v. Dandridge, 12 Wheat. 70.)

Decree affirmed.

Opinion by *Clifford, J.*

STATUTE OF FRAUDS. EVIDENCE.

SUPREME COURT OF PENNSYLVANIA.

Taylor et al, *pltffs in error* v. Preston, *deflt. in error.*

Decided January 6th, 1876.

A verbal promise by a vendee who takes land subject to encumbrances to pay such encumbrances is valid.

The law raises an implied promise on the part of the vendee taking subject to encumbrances, when they enter into the consideration, to indemnify the vendors against them, and the vendor may sue to the use of the holder of the encumbrance without showing that he has paid it.

Parol evidence of a consideration not mentioned in the deed, if it be not inconsistent with that expressed, is admissible.

Error to Butler Common Pleas.

Preston, the plaintiff below, had purchased from Simon Young, by articles of agreement executed on the 19th of February, 1873, land in the county of Butler, for \$21,000, and having paid \$5,200, had assigned the articles to the defendants on the 19th March, 1873, two instalments of the purchase-money due to Young, amounting to \$15,800, remain unpaid.

Evidence was received tending to show that, although not mentioned in the contract, the defendant below agreed with plaintiff, when they took the assignment, to pay off the encumbrances, and that such agreement entered into the consideration of the assignment. Preston had not paid Young.

It was insisted, on behalf of the defendants below, first, that the alleged undertaking of the defendants was a verbal promise to pay a debt due by Preston to Young, and under the act of the 26th of April, 1855, could not be enforced; second-

ly, that under the pleadings and evidence a suit by Preston for the use of Young could not be maintained, and that recovery only could be had, if at all, in a suit brought in the name of Young himself; and thirdly, that even if the law would raise an implied promise, on the part of the defendants, to indemnify Preston, he must pay Young before he could recover.

The plaintiff below had judgment.

Held, 1. That the defendants were acquiring property for their own use. They were contracting to serve the purposes, not of the plaintiff but of themselves. And the agreement, if it was made, to pay Young, was not only a stipulation to pay a debt which Preston owed, but a stipulation to pay the price of property they had bought. In no ordinary sense did they become sureties or guarantors for Preston. Buying the land, the promise to pay for it, whatever the form, was a promise to pay their own debt. To hold the statute applicable to a case like this, it is believed, would be both a violation of principle and a departure from authority. That statute does not require a promise to be in writing where it is in effect to pay the promisor's own debt, though that of a third person be incidentally guaranteed; it applies to the mere promise to become responsible, but not to actual obligations. *Malone v. Kenner*, 8 Wright, 107; *Arnold v. Steadman*, 9 Wright, 186; *Maule v. Bucknell*, 14 Id., 39.

The promise is considered as not to pay the debt of another, but the debt of the property which has come to the promisor's hands. These considerations withdraws the promise from the operation of the act of 1855.

That if the evidence received established the fact that the agreement to pay the money due Young was a part of the consideration for the assignment, the ruling below, that the plaintiff was entitled to a recovery, was correct. The purchase of lands subject to the payment of the pur-

chase-money due to a third person, is a covenant by the vendee to pay such purchase-money, upon which an action may be maintained in the name of the vendor, for the use of him to whom it is due. The purchaser, as between himself and the vendor, makes the debt his own, and assumes to protect the vendor. *Campbell v. Shrum*, 3 Watts, 60; *McCrackin's Estate*, 5 Casey, 426; *Burke v. Gummey*, 13 Wright, 518; *Metzgers Appeal*, 21 P. F. S. 330.

3. That the admission of parol evidence showing the agreement between plaintiff and defendants, that the latter were to pay the encumbrances, and that this promise entered into the consideration, was correct, apart from the question raised as to the effect of the Statute of Frauds. It did not contradict or alter the written instruments, and was not inconsistent with the consideration expressed. *Buckley's Appeal*, 12 Wright, 491.

The court below, however, having erroneously withdrawn from the consideration of the jury some of the facts, the judgment must be reversed.

Judgment reversed.

Opinion by Woodward J.

STOCKS. SALE.

N. Y. SUPREME COURT, GEN. TERM,
FIRST DEPT.,

Henry L. Rogers, ptff. & resp't., v. John P. Gould, def't & appt.

Decided December 6, 1875.

In a purchase of stocks by a broker, and a sale in default of margin, it is a question for the jury whether the broker was to borrow money on the stocks for the purpose of carrying the same. Also, what is proper notice of sale for default of margin. A regular sale, namely, a sale to be delivered the next day, not void under the Statute of Frauds. Broker need not keep the identical stock on hand if he had other shares of the same stock to supply their place.

It is not error to refuse to charge that

where there are two witnesses contradicting each other, if the jury find both equally worthy of credit, their testimony is balanced, and plaintiff fails to establish his case.

Appeal from judgment entered on verdict of a jury in favor of plaintiff. Action to recover for loss on sale of stocks on defendant's account.

On May 12th, 1873, plaintiff bought for defendant, at his request, at the Stock Exchange, two hundred shares of Pacific Mail, at 53. Plaintiff was a broker, and defendant was accustomed to dealing in stocks. Stock was bought "regular," which means to be delivered and paid for on the following day. Plaintiff on the following day received and paid for the stock. Plaintiff testified that he sent to defendant for margin which he had promised to put up, and which, according to custom, was 10 per cent. of the purchase price. On the 14th and on the 15th plaintiff called on defendant and informed him that unless the margin was put up by ten o'clock on the 17th, the stock would be sold on his account; that defendant requested until 11 A. M., which time plaintiff granted. At a few minutes after 11 A. M., the 17th, no margin having been put up, the stock was sold at the Stock Exchange at a loss of \$1,500.

Plaintiff was to carry the stock. On the 13th he hypothecated it and borrowed money to carry it, and twice thereafter repeated the operation. At the time of the sale he did not have the original stock purchased, but delivered the same kind of stock, only that the certificates bore different numbers, and at all times between the purchase and sale plaintiff had more than two hundred shares of this stock on hand, differing only in the numbering of the certificates. Defendant denied giving any order or direction to sell. The Court charged that the jury must be satisfied that plaintiff, by agreement, was to carry the stock for defendant, and have the right, in carrying, to borrow money upon it,

and that for plaintiff to recover they must be satisfied that defendant had notice of sale at a specified time in default of margin, and that it was fairly sold. That the sale of two hundred shares would be sufficient though not the identical shares purchased.

Defendant's counsel excepted to the last part of the charge, and requested the Court to charge that the contract on the 18th of May was void by the Statute of Frauds, as no part of the stock was delivered or money paid on that day. That the hypothecation of the certificates, was a conversion by plaintiff, notwithstanding he had other certificates to be used in their place. The Court refused, but charged that such hypothecation was a conversion, unless they believed plaintiff was authorized to do so by defendant, or by the dealings between them. Defendant's attorney also requested the Court to charge that if the jury gave equal credit to both plaintiff and defendant, their testimony balanced the one against the other, and there was a failure of proof. The Court charged that they must reconcile their statements if they could, if not, they must judge between them. Jury rendered judgment for plaintiff.

Wm. H. Arthur for resp't.

Nelson Smith for appt.

Held, No error in the charge or refusal to charge.

The sale and purchase was consummated in accordance with the usages of the board. The delivery, acceptance, and payment on the following day was sufficient, and neither party could allege the Statute of Frauds.

Plaintiff was not bound to keep in his possession the identical stock. The question seems to be settled by the Court of Appeals. *Horton v. Morgan*, 19 N. Y., 170; *Stewart v. Drake*, 46 N. Y., 449-453; *Taussig v. Hart*, 58 N. Y., 425.

The question of notice was properly submitted. It was necessary to give notice of the day, time and place at which

such sale would be made, and it was submitted whether what transpired constituted such notice.

The refusal to charge in reference to the balancing of the testimony of plaintiff and defendant was proper. The request was not to charge that if their testimony exactly balanced, and there were no other facts to determine by, the plaintiff failed to prove his case; but in case both were equally worthy of belief, this would eliminate all consideration of other evidence that might tend to corroborate the testimony of the plaintiff. Such a charge would be manifestly improper where there is any other evidence in the case.

Judgment affirmed.

Opinion by *Davis, P. J.*; *Daniels*, and *Brady, J. J.*, concurring.

TRUSTS.

NEW YORK SUPREME COURT, GEN.

TERM, FIRST DEPT.

Peter Brunner, resp't., agst. Henry Meigs, Jr., et al., as trustees, &c., appls.

Decided December 30, 1875.

Money paid for land purchased at an auction sale may be recovered back upon the discovery that the grantors in the deed could not give a valid title to the premises.

Questions of title arising out of the provisions of the trust clause in a will.

Appeal from a judgment recovered by plaintiff at Special Term.

Action brought to recover back the sum of \$1,799.77, it being auctioneer's fees and ten per cent. of the purchase price of certain real estate, purchased at an auction sale, and also to have the agreement to complete the purchase cancelled.

The grounds of the action were that the defendants, who sold the property, had refused and were unable to give a perfect

title to plaintiff of the property purchased.

The question is, whether the defendants as trustees, &c., could give a valid title to the property brought in question, and are necessary to be determined by the provisions of the last will of John J. Palmer, of the city of New York, which are as follows:

The testator devised all his estate, real and personal, to certain persons therein named, to hold the same during the life of his wife Margaret, and pay the income thereof to her, and upon the further trust, that immediately after the death of his said wife, the said trustees should divide the said estate into seven equal parts, that being the number of testator's children then living. The income of each of said parts, he directed his said trustees to pay to a child (one of the seven children) during life, and upon the death of any child leaving issue him surviving, he directed his said trustees to immediately convey and make over to such issue, said one-seventh part. In the divisions of the estate into seven parts and in the assigning of one of such parts to each child, the testator's advances to each child, to be found in a certain book named, should be included to make up the seventh part to such child, but no interest should be reckoned on advances, and in case the advances to any of said children should exceed the seventh part of the estate, then such child or children should not become indebted to the estate for the amount of such excess, but the amount of such excess was by the will bequeathed to such child.

The said testator also provided, in and by said will, that the better to enable the said trustees to carry into effect the directions herein before mentioned, that the said trustees should have full power and authority at any and all times during the continuance of the said trusts respectively, in their discretion, to change the investments of the estate and property by

them held in trust or any part thereof, and for such purpose or otherwise, to sell or convey all or any part or parts of said estate which should by them be held in trust. Margaret Palmer, the wife of the testator, and two of his children, Robert G. Palmer and James H. Palmer, died before the testator without issue and unmarried. No division into shares of the estate of said testator was ever made by said trustees as directed by said will. The testator died in 1858. On the 16th day of November, 1872, Henry, one of the sons of the testator died, leaving him surviving a widow and several minor children. That upon the 1st of July, 1873, the said trustees offered for sale certain portions of the real estate of the testator, which was struck off to plaintiff at the price of \$15,997.75; he paid 10 per cent. down and \$200 auctioneer's fees, and signed a contract with defendants, as trustees under the will, to complete the purchase.

This action is to recover the moneys so paid and cancel the contract of sale.

Flanagan & Bright plffs. and respts
Roe & Macklin defts. and appls.

Held, In this case it appears that the trustees have neglected to make the division or partition directed by the will for the term of fifteen years from the term designated in the will. That it was evidently the intent of the testator that each of the seven parts into which he directed his estate to be divided, should be held upon separate and distinct trusts, and that immediately upon the death of any one of his children leaving issue, him or her surviving, that the share of such child, so dying, should vest immediately in the issue of such child. The power of sale given in the will was given to the trustees for the purpose of enabling them to make the divisions directed by said will, and also after the said division to change the investments of any separate share. In this case it would appear that the said trustees, having neglected to make the division directed by said will, the share of said

estate belonging to Henry Palmer, upon his death vested immediately in his children, and that they became tenants in common with said trustees in the whole of said estate. The power of sale in the trustees which would enable them to convey the whole title, ceased upon the death of Henry Palmer. The trust, by the terms of the will has terminated, as to the one-seventh part of the estate, and the *cestui que* trusts have become tenants in common with the said trustees in said estate.

The court, on a proper application being made to it, would undoubtedly partition the estate into five equal parts (two of the children of testator having died unmarried and without issue), and would transfer one of the five parts to the children of Henry Palmer. The deed, therefore, did not convey to the plaintiff the clear title to the premises purchased by him, and he is entitled, therefore, to recover back, with interest, the moneys paid upon such sales, and have his contract to complete purchase cancelled.

Judgment of Special Term affirmed with costs.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring, *Brady, J.*, dissenting, holds, That the interest of the children of Henry Palmer was not only subordinate to, and controlled by the trust, but it was a contingent or limited one, dependent upon the advances made to their parent during the lifetime of the testator, and that the children could acquire their right only by enforcing the performance of the trust.

USURY.

SUPREME COURT OF ILLINOIS.

Downey, *adm.*, v. Beach.

It is not usurious to insert in a note, as liquidated damages, that after maturity it shall bear interest in excess of the legal rate.

A Court of Equity will not restrain proceedings at law upon such a note.

Bill to enjoin a suit at law. Complainant gave his note, dated July 26th 1870, payable one year after date, and bearing interest at the rate of 10 per cent. per annum, with 30 per cent. per annum after maturity, as liquidated damages for non-payment when due.

Suit had been commenced and a default entered, when the bill was filed to prevent the entering of final judgment. With his bill the complainant tendered the principal of the note, with 10 per cent. interest, together with the costs of the common law case.

Held, 1. That although the party agrees to pay a rate of interest in excess of that allowed by statute, after maturity, it is, nevertheless, regarded in the nature of a penalty to secure prompt payment. In such cases the penalty is liquidated damages, fixed by the solemn agreement of the parties. When made for the sole purpose of securing prompt payment, and understandingly entered into, such contracts are valid at law, and may be enforced.

Lawrence v. Cowles, 13 Ill., 579.

Smith v. Whittaker, 23 Ill., 267.

Blair v. Chamblin, 39 Ill., 421.

2. The penalty imposed being liquidated damages, which have been the subject of adjustment by agreement of the parties, a Court of Equity will withhold its aid, and leave the parties to their legal rights, whatever they may be.

There is nothing in the facts alleged calling for the interposition of a Court of Chancery upon equitable grounds. That complainant was ignorant of the 30 per cent. provision affords no ground for relief. It was his own negligence, against which it is not the province of a court of law or equity to afford him relief.

Decree reversed and bill dismissed.

Opinion by *Scott, C. J.*

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AGISTMENT. ABSENCE OF
SCIENTER.ENGLISH DECISIONS—QUEEN'S BENCH
DIVISION.

Smith v. Cook.

1 Law Reports, 79.

Decided December 14, 1875.

An agister of cattle is liable for damages done through his negligence by a vicious animal in his care, to another animal also in his care, although he may not have known the mischievous disposition of the former.

Plaintiff delivered a horse to the defendant to be agisted, kept, and taken care of. The defendant placed the horse in a field with a number of heifers, knowing that a bull, kept on adjoining land, had several times been found in the field, and that there was no sufficient fence to keep it out.

He, however, did not know that the bull was of a mischievous disposition. The horse was gored by the bull and killed. Witnesses testified that it was imprudent to turn young horses among horned cattle; others, that there was no danger in such a practice.

The Court left to the jury whether the defendant acted without reasonable and proper care in putting the colt in the field near the bull and with the heifers.

Verdict for plaintiff.

A *rule nisi* was obtained to enter a nonsuit on the ground there was no evidence of scienter.

Held, That defendant was bound to take reasonable care of the horse, and that if it was killed through his negligence he was liable, and that the doctrine of scienter ought not to be extended to a contract to take reasonable care.

Rule discharged.

Opinions by Blackburn, Quain and Field, J. J.

ANSWER. AMENDMENT.

N. Y. SUPREME COURT, GENERAL TERM
—FIRST DEPARTMENT.

George B. Chase, *respt.* v. Thomas Lord and another, *exrs., applts.*

Decided January 28th, 1873.

Long delay in making application for leave to amend answer for the purpose of setting up the Statute of Limitations, is good ground for denying such application, especially where plaintiff's rights against other parties have been lost on account of the failure of defendants to set up said defence in the first instance.

Appeal from an order refusing leave to amend an answer by setting up the Statute of Limitations.

The action was brought to charge defendants' testator as the owner of stock in the Columbia Insurance Company, on the ground that a certain increase in its capital stock had not been paid in, and notice of such payment filed as required by the general act for the incorporation of insurance companies. Defendants desired to set up that the action had not been commenced within three years as required by the Code. Sec. 92, sub. 2.

W. C. Whitney, for plff. and *respt.*

D. D. Lord, for applt.

Held, The motion was properly denied, on the ground of laches. The action was commenced in November, 1870, and issued joined in February, 1871; that had the Statute been pleaded, then, plaintiff might have sought some one of the trustees or corporators in whose favor that defence did not exist. At the present time, not only the three years have elapsed, but also the limitation of six years against the others. It is a question whether the action is brought for a penalty within sub. 2, sec. 92 of the Code. The question in the case is strongly analagous to that in *Cuming & Homer v. McCullough*, 1 N. Y., 47.

The reasons given by the Court below for denying the motion seem to us sufficient to show that the discretion of the

Court was properly exercised. The long delay in making the application is sufficient to show that the amendment would not be in furtherance of justice.

Order affirmed.

Opinion by *Davis, P. J.*; *Daniels* and *Brady, J. J.*, concurring.

APPEAL PRACTICE.

N. Y. COURT OF APPEALS.

The People *applts.* v. *Horton, et al.*, *respts.*

Decided January 25, 1876.

A party seeking, under the act of 1874, to restrict the general right of appeal, has the onus, and must bring the case within that act.

This was a motion to dismiss an appeal, on the ground that it was forbidden by Chap. 322, Laws of 1874, which provides that no appeal shall be taken from an order granting or refusing a new trial, where the amount involved does not exceed \$500, exclusive of costs. The action was brought to restrain the defendants' business, but the complaint does not demand any money, and the pleadings do not state the value of the business. It was in erable from the pleadings, and the evidence tended to show, that the business was worth much more than \$500. Plaintiff claimed that as the action was not on contract, it was to be governed by one of the particular provisions of the act of 1874, and the amount claimed in the complaint must be deemed the amount of the subject matter of the controversy, and as no amount was specified, the subject matter is of no account, and there could be no privilege of appeal.

G. A. Scroggs, for *applts.*

M. A. Whitney, for *respts.*

Held, That the case falls within the general provisions of law giving a right of appeal to this Court, and that plaintiffs in seeking to restrict that general right by applying the special prohibitory pro-

visions of the act of 1874, have the onus, and in order to bring the case within that act must show that the subject matter of the controversy did not amount to \$500, and having failed to do this defendants are not brought within the act, and are not barred from their right of appeal.

Motion denied.

Opinion by *Folger, J.*

ASSESSMENTS. JUDGMENT BAR.

N. Y. SUPREME COURT—GEN'L TERM

FOURTH DEPT.

Zink v. City of Buffalo.

Decided January, 1876.

A judgment in favor of other parties, setting aside assessments, cannot be used by another person on ground that such judgment operated to annul the whole assessment.

It only affected the parties to that judgment.

This action was brought to set aside an assessment of plaintiff's land, made for the purpose of defraying the expenses of paving a street in Buffalo. Parties named W. and M. who were owners of land on the same street, had, previous to this, commenced actions and had recovered judgments setting aside such assessment as to them, and from whose judgment an appeal had been taken.

Upon the trial of this action the defendant introduced the judgment roll in the case of W. and M., and requested the court to find and decide that this judgment operated to annul the roll, and all the assessments therein, including plaintiff's, and therefore plaintiff could not maintain this action, as there was no existing assessment, &c.

Appeal from the judgment of the Superior Court of the City of Buffalo, certified into this Court.

Frank R. Parkins, for *applt.*

S. Rogers, for *resp.*

Held, It was not an error of the judge

at Special Term in refusing to find and decide that the judgment entered in the case of W. and M., introduced on the trial operated to annul said assessment roll, and all the assessments mentioned therein, including those set forth in the complaint in this action, and that, therefore, the plaintiff could not maintain this action.

Such a decision and judgment only bound the parties in the actions, and set aside said assessment so far as it was a lien upon the lands of W. and M. It still remains a lien and a cloud upon the plaintiff's lands. That action did not bring up, like a certiorari, the whole assessment roll for review, in behalf of all the parties assessed. In such case the judgment of the court would be upon the whole record, and might set aside and annul the whole assessment.

Judgment affirmed.

Opinion by *E. D. Smith, J.*

ATTACHMENT.

N. Y. SUPREME COURT, GENERAL TERM
—FIRST DEPARTMENT.

Crandall et al., respt. v. McKaze, applt.

Decided January 28, 1876.

A sworn copy of complaint setting out the plaintiff's cause of action in full, annexed to the affidavit, on which an attachment is issued, and referred to therein, is a substantial compliance with sec. 229 of the Code.

Appeal from order of Special Term denying motion to vacate attachment.

Plaintiffs obtained an attachment against the property of defendant, on an affidavit which set out plaintiffs' cause of action, as follows:

"That a cause of action exists in favor of said plaintiffs and against said defendant, arising out of a contract made and executed by said defendant, and by him delivered to said plaintiffs, and which is more particularly set forth in the copy of complaint hereto annexed in this action," and further alleged defendant's non-residence, a copy of a verified complaint an-

nexed, setting out in detail its cause of action.

A motion was made at Special Term to vacate the attachment on the ground that it was insufficient and did not specify the grounds of plaintiffs' claim, and was denied.

Barrett, Redfield & Hill, for resp't.

Porter, Lowrey, Soren & Stone, for appl'ts.

Held, That the prerequisites required by the Code (sec. 229) appeared by the affidavit in this case. The details were in the complaint, a copy of which was annexed, which revealed to the Judge, considering the application for the attachment, what they were, and upon which the necessary conclusions could be drawn.

The complaint could be used as an affidavit (59 N. Y., Rep 647), and we do not understand why a sworn copy may not be employed in the same way. It became necessarily a part of the affidavit when annexed and referred to as it was in this case, and as such it presented a full statement of the cause of action as it was alleged to exist.

Order affirmed.

Opinion by *Brady, J.; Daniels, J.*, concurring.

BANKRUPTCY. ASSIGNEE'S TITLE.

U. S. SUPREME COURT.

Christian S. Eyster, plff. in error, v. Thomas Gaff, et al., defts. in error.

Decided October Term, 1875.

An assignee in bankruptcy, acquiring title to lands by virtue of the Bankrupt Act, pending a litigation in a state court concerning them, takes subject to the final decree of that court.

In error to the Supreme Court of the Territory of Colorado.

Action of ejectment brought originally by Thomas and James Gaff against plaintiff in error.

The title to certain lots in Denver City

is the subject of controversy. George W. McClure was the source of title, common to plaintiffs and defendant. McClure had made a mortgage on the lots to defendants in error, to secure payment of the sum of \$18,000.

A suit to foreclose this mortgage was instituted in the district court in 1868, which proceeded to a decree and sale, and plaintiffs became the purchasers, receiving the master's deed, which was duly confirmed by the court.

This decree was rendered July 1, 1870. On the 9th day of May preceeding, the mortgagor, McClure, filed a petition in bankruptcy, and on the 11th day of May he was adjudged a bankrupt, and on the 4th day of June John Mechling was duly appointed assignee. The bankrupt filed schedules in which these lots, and the mortgage of the Gaffs on them, were set out.

Plaintiff in error was a tenant of McClure, and insists that all the proceedings in the foreclosure suit, after the appointment of the assignee in bankruptcy, are absolutely void, because he was not made a defendant.

Held, The Court below having acquired jurisdiction of the parties and of the subject matter, neither a sale by the mortgagor nor the vesting of the title in the assignee by operation of the bankrupt law, could avoid the full effect of its final decree; that there is nothing in the bankrupt act which places the title of the assignee upon a different footing in this respect from that of any other person taking *pendente lite*.

Judgment affirmed.

Opinion by *Miller, J.*

BURDEN OF PROOF.

N. Y. COURT OF APPEALS.

Heermans, trustee, &c., *applt. v. Ellsworth, respnt.*

Decided February 8, 1876.

The burden of proof is upon an as-

signee of a debt, to establish that the debtor was notified of the assignment in order to protect himself against payment to the assignor.

This action was brought by plaintiff as trustee of the estate of F., under a deed of trust executed by F., to recover money loaned by F. to the defendant. The defendant pleaded payment and gave evidence showing payment to F. after the execution of the deed. Plaintiff's counsel, upon the trial, requested the Judge to charge the jury that the burden of proof was upon the defendant, to show that the payment was made without notice of plaintiff's rights, and in good faith. This request was refused, and plaintiff excepted, and also excepted to the charge on this point, that the burden of proof was upon him.

A. Hadden for applt.

Geo. B. Bradley, for respnt.

Held, That the charge and the refusal to charge were correct; that defendant had a right to presume that the original creditor was entitled to receive payment, and it was incumbent upon plaintiff to establish the fact of notice of the transfer.

It devolves upon an assignee to establish that the debtor was notified, in order to protect himself, against a payment to the assignor. 9 J. R., 64; 12 id., 343; 19 id., 95; 1 Hill, 552; 2 Seld, 188.

Bush v. Lathrop, 22 N. Y., 550, distinguished.

Plaintiff's counsel also requested the Judge to charge, that the pendency of an action to set aside the trust deed between F. and plaintiff, of which defendant had knowledge, and on which he had been sworn as a witness, was constructive notice to defendant, of the existence of the deed. The Court refused so to charge.

Held, no error; that it was a question of fact for the jury.

Judgment of General Term, affirming judgment for defendant at circuit, affirmed.

Opinion by *Miller, J.*

CONTRACTS.

U. S. SUPREME COURT.

Gilbert Woodruff, et al., *plffs. in error*, v.
Benjamin F. Hough, et al., *defts in error*.

Decided October Term, 1875.

A contractor is liable to his sub-contractor for work done, although such work may be rejected by the party who originally let the contract; there being nothing in the agreement between the contractor and sub-contractor, which makes the approval of the work by the original party necessary.

In error to the Circuit Court of the United States for the Northern District of Illinois.

John Allen having contracted with the supervisors of the County of Winnebago, Illincia, for the building of a county jail, made another contract with defendants in error, who were plaintiffs below, for all the wrought-iron work necessary in the construction of the building. The plaintiffs here, who were defendants below, became sureties for Allen by a written guaranty that he would perform his part of the contract; that is, would pay as he had promised these sub-contractors.

In the progress of the work differences arose between Allen and his sub contractors, growing out of the refusal of the supervisors to accept the work furnished by the latter, on the ground that it was not in compliance with the specifications of Allen's contract with the supervisors, and with the defendants in error. After much of the work was done and put in place, it was condemned, and the work abandoned by defendants in error, who brought this suit against Allen's sureties for his failure to pay as they had guarantied he would.

Held, That Hough and Butler, the sub-contractors under Allen, were not bound by all Allen's contract with the supervisors. But while they accepted specifications for the wrought-iron work which were in Allen's contract with the supervisors, they did not agree to be bound by

the supervisor's acts in accepting or rejecting the work as coming up to these specifications. This Allen did in his contract with them. The supervisors reserved the right to decide as between them and Allen whether the work conformed to the specifications. Allen reserved no such power in his contract with defendants. These latter had a right, in the event of a difference on that subject, to have the difference settled by a court of law, and Allen run that risk if he rejected any of their work. But the supervisors could reject work without such hazard, because Allen had agreed to submit to their judgment in case of such a difference.

Judgment affirmed.

Opinion by *Miller, J.*

COSTS. PRACTICE.

N. Y. SUPREME COURT—GENERAL TERM,
SECOND DEPARTMENT.

Growx, respt. v. McCrum, applt.

Decided February 7, 1876.

A notice of appeal from a Justice's Court, where the recovery was over one hundred dollars, to a County Court, which states as ground of appeal "that the Justice erred in finding that plaintiff rendered services in a sum exceeding in value the sum of twenty-five dollars," is sufficient to entitle the appealing party to costs in the County Court, if recovery therein is reduced more than ten dollars.

The plaintiff recovered a judgment for \$125, besides costs, in a Justice's Court, and the defendant appealed to the County Court.

The action was re-tried there and resulted in a judgment for the plaintiff for \$93.

The defendant, in his notice of appeal to the County Court, stated the following, among other grounds of appeal.

First, That the Justice erred in finding that the plaintiff rendered services for the defendant in a sum exceeding in value

the sum of twenty-five dollars.

The question is presented as to which party is entitled to costs.

Roger H. Lyon, for applt.

H. B. Davis, for resp't.

Held, The appellant's right to costs depends upon his notice of appeal. He must state in his notice in what particular or particulars he claims the judgment should have been more favorable to him. Sec. 371 of the Code.

In this case the first particular ground of appeal is that the Justice erred in finding a sum exceeding \$25. This means the judgment is for too much, and should only have been for \$25.

This threw upon respondent the necessity of making an offer to correct the judgment in the amount, or to be liable to pay costs if the judgment was reduced \$10. No offer was made, and the judgment was so reduced.

The appellant was entitled to costs in the County Court.

Order reversed, with \$10 costs, besides disbursements.

Opinion by *Barnard, J.*

DAMAGES. INVOLUNTARY CONVERSION.

SUPREME COURT OF MICHIGAN.

Winchester v. Craig et al.

Decided January Term, 1876.

The measure of damages in trover for conversion by an involuntary trespasser, is the market value of the property at the point where it is sold by the trespasser, less the expense of getting it there.

Where it is not sold, or the market value does not cover the expense, the measure is its value when first taken, together with any profits that might be derived from its value in the ordinary market, with interest.

Winchester brought an action of trover to recover damages for the conversion by defendants of a quantity of pine saw-

logs. It appeared on the trial that defendants were the owners of the N. ¼ of sec. 33, t. 21, N. r. 6 E., in this State; that they contracted with one Smith to lumber on said land; that by mistake Smith cut the logs in question upon the south half of said section, caused the same to be hauled a distance of about five miles to the Ausable river, thence run to the boom at the mouth of said river, there rafted and towed from thence to Toledo in the State of Ohio, where they were sold at twelve dollars per thousand feet.

It also appeared that when these logs were cut the south half of said section was owned by Eben B. Ward, and that he afterward, and before suit brought, assigned all his claim and right of action for such cutting, to the plaintiff.

The plaintiff claimed to recover the price at which the timber was sold in Toledo.

The Court charged the jury, that if they found no wilful wrong on the part of the defendant, they might award as damages the value of the property where it was taken, viz: one dollar and fifty cents per thousand, together with the profits, which might have been derived from its value in the ordinary market. Or, that they might take the market value at Toledo, deduct precisely the sum defendants expended in bringing it to that market, and putting it in condition for sale, and award the difference between these two sums, with interest in either case from the time the conversion took place; and refused to charge that the plaintiff would recover as damages the price for which the logs were sold in Toledo.

The finding of the jury, as appears from the printed record, was as follows: "The defendants cut the timber on the land of Ward by mistake; the quantity cut was 193,786 feet; the value on the land after it was cut was two dollars per thousand feet; the value at Toledo, and for which the defendants sold the timber

was twelve dollars per thousand; the expenses of the defendants on the timber in cutting and removing the same to Toledo, nine dollars and thirty-seven cents per thousand," and they assessed the plaintiff's damages at the sum of \$3,631 40.

Held, That the instructions given the jury were correct.

Judgment affirmed.

Opinion by *Marston, J.*

EVIDENCE. PRACTICE.

N. Y. COURT OF APPEALS,

Marks, respt. v. King, applt.

Decided February 8, 1876.

In an action upon a note where the defense is forgery, other notes and checks of defendants, tending to connect defendant with the origin of the debt, for which the note in suit was given are admissible in evidence.

A refusal to strike out evidence received under objection constitutes no ground for an exception; if for any reason it should not be considered, the remedy is to ask for instructions that it be disregarded.

This action was brought against defendant as the indorser of a promissory note. The defense was that the indorsement was a forgery. Upon the trial, certain drafts given to B., the maker of the note in suit, as the avails of the discount of a note to take up which the note in suit was given, were received in evidence under defendant's exception. The discount of the note taken up had already been proved without objection.

G. W. Hotchkiss, for respt.

O. W. Chapman, for applt.

Held, That the evidence was competent as part of the *res gestæ*; that their admission, without other evidence, did not necessarily affect defendant, or tend to establish the genuineness of his indorsement of the note in suit; that the evidence was also competent as laying a foundation for other evidence which might connect defendant with the note; that it was proper as showing that the note which

formed the consideration of the defendant's alleged indorsement had a valid inception. Defendant subsequently moved to strike the drafts, and all evidence relating thereto, out of the case. This was denied, and defendant excepted.

Held, no error; that the denial of the motion did not constitute any ground of a legal exception; that evidence received under objection, which for any reason should not be considered by the jury is not necessarily to be stricken out, but may be retained in the discretion of the court, and the remedy is for the party to ask for instructions to the jury to disregard it.

Plaintiff offered in evidence a check signed by defendant upon the Second National Bank of Jersey City, given for the avails of a note made by defendant and claimed to have been discounted by said bank, which it was claimed was paid and taken up by the drafts, which were the avails of the note, to take up which the note in suit was given, the note then discounted having been made for the accommodation of the maker of the note in suit. Defendant objected that the witness, who was cashier of the Jersey City Bank, had no knowledge of the note or drafts, and that it was not the best evidence of the discount of the note.

Held, That the check was a circumstance connecting the defendant with the origin of the debt for which the note in suit was given.

Defendant offered to prove that a witness for the plaintiff had been active in procuring the indictment of B. for counterfeiting the indorsement. The evidence was excluded.

Held, no error; that this fact would not have discredited his testimony either in respect to declarations and admissions of the defendant, or his opinion as to the genuineness of the indorsement as given under oath. That the fact offered was entirely collateral, and was properly rejected. 32 N. Y., 127.

Judgment of General Term, denying

defendant's motion for a new trial, affirmed.

Opinion by *Allen, J.*

FENCES. RAILROAD.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPT.

Spinner v. N. Y. C. and H. R. R. R. Co.

Decided January Term. 1876.

A railroad company must maintain fences along the line of its road, and at crossings, gates, &c.

Failure to keep gates shut is evidence of negligence.

In September, 1872, plaintiff was in possession of a farm near Ilion, Herkimer County, on which he had a herd of cattle. Defendant's railroad ran along the side of the farm adjoining the highway, which lay between the railroad and the farm.

Between the highway and the railroad defendant had built a fence, and in the fence, near the house of one Farrington, a gate was placed, as well to enable him to pass to and from a part of his farm, lying on the opposite side of the railroad from his house, as to enable persons carrying freight to and from defendant's depot, near Ilion, to pass to and from said depot with freight.

On the night of September 30, 1872 the plaintiff's fence was in some way torn down, and plaintiff's cattle passed through it on to the highway, and the gate near Farrington's being open, the cattle passed through on to the track of the defendant, and some of them were killed.

Verdict for plaintiff.

Held, That a railroad company is bound to see to it that all gates on its road are kept closed, and it is liable if they are left open, even by the owner of land for whose convenience they are constructed. Such owner owes no duty to the owner of cattle that may be in the highway or adjoining fields.

Judgment affirmed.

Opinion by *Mullan, P. J.*; *Smith and Gilbert, J. J.*, concurring.

FRAUD. PRINCIPAL AND AGENT.

N. Y. COURT OF APPEALS.

Indianapolis, Peru & Chicago R. R. Co., *respt. v.* Tyng, applt.

Decided January 18, 1876.

A party induced by fraud to make a purchase of property, and to take a warranty therefor in writing, and under seal, may disregard the latter, sue directly for the fraud, and give parol evidence of the fraudulent representations.

A principal can enforce all rights of action acquired on his behalf by his agent, irrespective of any obligations or liabilities arising in the transaction between the principal and agent.

In fixing the value of such property as a locomotive engine, the whole country is but a single market.

This was an action to recover damages for the alleged fraud and deceit of defendant in the sale to plaintiff of two locomotive engines. The complaint alleged a purchase by plaintiff through C., its agent, induced by the representations made by defendant, that plaintiff believed and relied upon them; that they were false and made with intent to defraud, and that by means thereof plaintiff suffered loss. That defendant gave a warranty in writing of the character and quality of the engines.

Held, That the complaint contained facts sufficient to constitute a cause of action for fraud.

Also, *held*, That an action *ex delicto* can be maintained, where after fraudulent representations have been made, a personal undertaking had been given, which would not have been taken but for the confidence induced by the representation, and where these have been relied upon, both in making the contract and in taking the warranty of quality, and it was shown that the deceit was the moving cause of both acts, though the contract was in writing and sealed, and contained covenants of

extensive reach to protect the plaintiff's rights. If the defendant has been dishonest in the transaction, plaintiff may disregard them all and sue directly for the fraud, and give parol evidence of the representations, though they are not noticed in the written contract. 18 J. R., 325; 18 Wend., 193.

Defendant claimed that plaintiff was not the real party in interest and could not maintain this action, that C. did not purchase the engines as agent for plaintiff, or assume to act as such agent, and that the money paid by C. has not been repaid to him by plaintiff, and that the papers which passed between C. and defendant showed that C. dealt as a principal, and that parol proof that he acted as an agent, was incompetent. It appeared from the evidence that C. was plaintiff's agent, and that it authorized him to purchase the engines.

Held, That as C. acted as plaintiff's agent, all loss resulting necessarily from the transaction was plaintiff's loss, and it could enforce all rights of action acquired thereby against defendant, whatever obligations and liabilities arose in the transaction from plaintiff to C. 15 East 62; 2 Smith's L. Cas., 342; 9 B. & C., 78. Plaintiff had a right to intervene and take to itself the transaction, and to show by parol that it was the real party in interest.

The referee received evidence of witnesses, who saw the engines, at a place distant from that of sale, some time thereafter, as to their value. It appeared that they were then in the same condition as at the time of sale.

Held, no error; that the value of the engines was not governed by the state of the market at a particular time; but as to such property the whole country is but a single market.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Folger, J.*

JUDGMENT. PROCESS.

U. S. SUPREME COURT.

Alexander M. Earle, et al., *appls.*, v. James H. McVeigh.

Decided October Term, 1875.

Due notice, actual or constructive, to the defendant, is essential to the jurisdiction of all courts.

What is a good notice under a statute providing for constructive process, decided.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Two suits were commenced by the plaintiff against the present defendant, and the plaintiff thereon obtained service of process in the respective suits on the same day, in the words following: "Executed the within summons February 24, 1862, on James H. McVeigh, by leaving a copy thereof posted at the front door of his usual place of abode, neither he nor his wife, nor any white person who is a member of his family, and above the age of sixteen years, being found at his said usual place of abode."

The defendant not appearing, judgments were rendered against him.

It was admitted that defendant had been for many years a resident of the place where the process was served; that he was the head of a family, owning the dwelling in which he resided; that he, together with his family, left their house seven months prior to the alleged service of process, owing to the threatened occupation of the town by the Federal forces, went within the Confederate lines and there remained until the close of the war; that his absence from the town was not one which he regarded as absolute and permanent, but contingent and temporary, depending for its continuance upon the fortunes of the war. It also appeared he had left no white person in the house, and that these facts were known to the plaintiff's attorney, and to the officer who made the return.

The statute provides for service of process upon resident defendants, temporarily absent from home, by delivering a copy, and giving information of its purport to his wife, or any white person found at his usual place of abode, who is a member of his family and above the age of sixteen years; or if neither he nor his wife, nor any such white person be found there, by leaving such copy posted at the front door of his usual place of abode.

The question now raised is whether the judgments are valid.

Held, That the service was insufficient; that it appeared by the evidence that the house was not the usual place where the defendant or his family resided at the time the notice was posted; that usual place of abode did not mean *last* place of abode; that the law intends that the person against whom the notice is directed, should then be living or have his home in said house, although temporarily absent.

Decree setting aside judgment affirmed.
Opinion by *Clifford, J.*

JURISDICTION.

U. S. SUPREME COURT.

Charles Rockhold, *plff. in error v.* Thomas Rockhold, et al., *defts in error.*

Decided October Term, 1875.

A claim by a trustee, that he was compelled to pay over the trust funds to the Confederate States, when the country was under military rule, is not a Federal question, and will not give this court jurisdiction to review a decision of the state court.

In error to the Supreme Court of the State of Tennessee.

This suit was to bring the executors of the will of Thomas Rockhold to an account with the plaintiff, Charles Rockhold, one of the legatees. The defendant, William D. Blevins, one of the executors, answering the bill, said, in substance, that, contrary to his wishes, he was forced by a military power that he could not control, to receive the sum of \$5,004.74 from one

of the debtors of the estate, in Confederate money, and pay it over to the receiver of the Confederate States. When this was done the country was under complete military rule, and he acted, contrary to his wishes, under Confederate authority, which he was compelled to obey. This, he claimed, excused him from accountability to the plaintiff for this amount, and the Supreme Court of the State has so decided.

H. M., This is not a Federal question, and the motion to dismiss the case for want of jurisdiction must be granted.

Dismissed.

Opinion by *Waite, C. J.*

LIFE INSURANCE. FALSE STATEMENT.

U. S. SUPREME COURT.

The *Ætna L. I. Co., plff. in error v.* France, *deft. in error.*

Decided October Term, 1875.

A life insurance policy, containing a clause providing it shall be void, if the answers made to questions by the insured in his application, are found to be false in any respect is wholly avoided by a false answer whether it be material or not.

In such case neither the court nor the jury can inquire into the materiality of either the question or answer.

Error to U. S. Circuit Court, Eastern District of Pennsylvania.

Action of assumpsit to recover \$10,000, the amount of a policy insured upon the life of Andrew J. Chew in 1865. Annexed to the policy and made part of it, was the application of Chew containing the questions and answers usual in such applications.

The policy contained the following clause. It is understood and agreed, that if the proposals, answers, and declarations * * * shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void.

Among others were the following questions and answers:

Question. Age next birth day?

Answer. 30 years.

Question. Has the party ever had any of the following diseases? * * * *
rupture (and others)?

Answer. None.

Evidence was given on both sides tending to show that Chew was 37, or at least 35 years old when he signed the application.

Evidence was also given upon the question of his having suffered from a rupture.

The Court left it to the jury to say whether the rupture (of which it was conceded the insured at one time suffered) materially affected the soundness of his health, at the time of application, or whether it was so far recovered, or was so remote as not to have increased the risk or the premium if mentioned, or whether the suppression of its existence was wilful, and as to the age, the Court charged that the representation must be material, but that if the insured was 35 the difference would not be immaterial.

Held, That the question of materiality of the answers did not arise; that the parties had determined and agreed that they were material; that their agreement on that point was conclusive, and that the only questions for the jury were: first, were the representations made; second, were they false, and that the Court erred in submitting the question of materiality to the jury.

New trial ordered.

Opinion by *Hunt, J.*

LIFE INSURANCE. FORFEITURE. EQUITABLE RELIEF.

U. S. CIRCUIT COURT—EASTERN DISTRICT OF PENNSYLVANIA.

Bird v. Penn Mutual Life Insurance Company

Decided February 7th, 1876.

A Court of Equity will reinstate the holder of a life insurance policy

which has been forfeited by reason of non payment of premiums, where payment of such premiums was impossible.

The defendants are a Mutual Insurance Company. In September, 1847, they executed and delivered to the complainant at Philadelphia a sealed policy of insurance in \$5,000 upon his life, payable to his wife. The premium paid was \$155 50. The insurance was for a year, with the privilege of continuing it from year to year on payment of a premium of equal amount before the end of each year. The policy contained a provision that if the assured should not make the annual payments on or before the several days appointed, then, and in every such case, the defendants should not be liable to the payment of the sum insured or any part thereof, and the policy should cease and determine, and all previous payments made thereon, and all profits for which scrip should not have been issued, should be forfeited to the defendants.

The complainant continued to pay the annual premiums punctually at Philadelphia until 1861, when the whole sum thus paid had amounted to \$2,177. He was a resident of the State of Virginia. The civil war, which broke out in April, 1861, prevented him from paying the premiums in September, 1861, and subsequently; and made it unlawful for the defendants to receive any such payment during the continuance of the hostilities.

The defendants being in possession of the policy, treated the insurance as ended by reason of the non-payment of the premium in September, 1861; and wrote upon the policy that it was "forfeited" and "cancelled," obliterating the signatures of their officers.

On the termination of the hostilities, the complainant, by a letter of 31st May, 1865, expressed a desire to know what steps he must take to continue his insurance. On 9th June, 1865, they wrote in answer stating that "the policy of insur-

ance was forfeited for non-payment of premium in 1861, and will not now be revived by the company." In the following year he renewed the correspondence, urging his right to be reinstated in the insurance. They repeated, and never in any wise qualified their original declaration that the insurance was forfeited. The correspondence was closed in December, 1867.

The bill was filed on 2d July, 1874. Its purposes were that the policy, &c., still in the possession of the defendants, should be exhibited by them, that the complainant should be permitted to pay all the accrued premiums which are unpaid, that the policy be declared valid and to have remained in force, and that the defendants should account for all the dividends which had been, or ought to have been declared upon it.

The defendants, by their answer, and in argument, insisted that the insurance had been forfeited in 1861, that the complainant had never made any tender of the premiums in question, and that his delay to institute the present proceedings ought to preclude him from relief if he were otherwise equitably entitled to it.

Held, That the complainant was entitled to the relief demanded; that defendants should account to him for his share of the profits of its business since their last settlement; that whatever he may be entitled to should be deducted from the amounts of the premiums since 1861, with interest; that he pay the balance to defendant, and that defendant deliver the policy to complainant with as beneficial effect as if it had been cancelled or effaced.

Opinion by *Cadwalader, J.*

MANDAMUS. PRACTICE.

N. Y. COURT OF APPEALS.

People *ex rel.* The Tenth National Bank, *appls.* v. Board of Apportionment

of the City and County of New York, *respts.*

Decided February 1, 1876.

Where, upon the return of an order to show cause why a mandamus should not issue, affidavits are presented on behalf of the defendant, upon which the relator takes no issue, but proceeds to argument, he admits the truth of the defendant's averments.

What was once a claim against the County of New York, having become a liability of the city, the latter may be sued upon it and a mandamus will not lie.

The relator applied for a peremptory mandamus to be issued, commanding defendant to authorize stock of the County of New York to be issued in pursuance of chap. 583, laws of 1871 § 4, for the purpose of raising moneys advanced and overdrafts paid by the relator to the Commissioners of the new County Court House in the City of New York. On the return of the order to show cause, affidavits were presented on the part of the Board to the effect that the loans and over-drafts, if made as alleged, were made by L, one of the commissioners, a director of the relator, without authority from the Board of Commissioners, and the sums were not advanced to the commissioners but to L, the relator, well knowing that the money was not to be used for the completion of the Court House, and that it was not so used. The relator took no issue upon the allegations of the affidavits and papers presented by defendant, but proceeded to argument and asked for a peremptory mandamus, which was awarded by the Special Term.

Henry H. Anderson, for applt.

John H. Strahan, for respta.

Held, That the relator's action was equivalent to a demurrer to the defendant's averments admitting the truth of them, but denying their sufficiency in law to prevent the issuing of the writ. 1 Wend, 474; and as defendant's papers showed that the relator was not entitled

to the moneys claimed, no case was made for the issuing of a peremptory writ, and the order at Special Term granting it was erroneous.

The Board of Apportionment of the city and county of New York has power to examine claims presented to it, and to exercise a judgment whether they are rightful before giving assent to provision for the payment of them.

Also held, That what was once, if the claim is legal, a liability of the county of New York has become a liability of the city, and the latter may be sued upon it. In such a case relief by mandamus will be denied.

Order of General Term, reversing order of Special Term granting a mandamus, affirmed.

Per curiam opinion.

MARRIED WOMAN. ACTIONS AGAINST.

N. Y. SUPREME COURT—GENERAL TERM FOURTH DEPT.

Henry M. Helles *et al.*, *respts.*, v. Amy E. Rossele, *applt.*

Decided January, 1876.

For goods purchased by a feme sole, she may be sued after marriage without joining her husband.

The action was for goods sold the defendant, who was at the time a *feme sole*, carrying on a separate business in her own name and for her own account. She afterwards married, and is sued by her married name for an account made with the plaintiff before marriage. The referee held her liable to be sued alone, without her husband, and gave judgment for amount of the account, from which defendant appeals to this court.

Held, the defendant was a *feme sole* when the debt was contracted, and liable to be sued as such upon the demand. Her subsequent marriage did not change her rights or liabilities in respect to said debt. At common law after the marriage it

would have been necessary to join her husband with her in the action, and he may still be so joined under the act of 1853, Chap 576, as held in *Lenox v. Eldred*, 1 N. Y. Sup. Court Rep., 142. But such joinder is not necessary or imperative. The execution would not go against the husband's property if he were joined as defendant, as at common law, but would only bind the separate property of the wife.

The husband in such case is in no sense responsible for the debt, except in respect to the property of the wife which may come to his possession by the marriage. For this he would be liable to account in a proper proceeding against him, if the separate estate remaining in the hands of the wife should prove insufficient to discharge the judgment.

The judgment should be affirmed.

Opinion by *E. Darwin Smith, J.*

MASTER AND SERVANT. INJURIES FROM NEGLECT OF FELLOW SERVANT.

N. Y. COURT OF APPEALS.

Malone, Adm'r's, &c., *respt.* v. Hathaway, Surv'r, &c., *applt.*

Decided January 18, 1876.

A master is not liable to his servant for the negligence of a fellow servant who has not been negligently appointed.

Where a master has left the control of his business to an employe, reserving to himself no discretion, he is liable for the neglect or omission of duty of the one thus representing him.

This action was brought to recover damages for the death of plaintiff's intestate, who was an employe of the firm of B. & Co., of which defendant was the surviving member, and was killed while in the discharge of his duty, by the breaking of a tub filled with boiling mash in the defendant's brewery. The evidence tended to show that the fall of the mash tub

was occasioned by the giving away of a post which supported the tub and the joist under it which had begun to decay. The decay was not visible, and could only have been detected by boring. The defendant proved that he kept a carpenter, B., whose business it was to keep the building in proper repair and buy the materials for the same. That defendant was not a carpenter himself, but that he sometimes conversed with B. about the repairs, and was in and about the building and saw what was going on. No personal neglect or want of care was charged upon the defendant, or any omission of duty or want of proper care in the selection of competent servants or agents to make repairs.

The Court charged the jury that it was the duty of the master to see that the employe was not exposed to unreasonable risks, and that he was bound to furnish a reasonably safe and secure building, and was responsible for B.'s neglect; that the question was whether B. failed to exercise reasonable prudence in not examining the joists and beams.

Held, (Church, C. J., and Rapallo, J., dissenting) error; that as there was no evidence of a surrender of power and control of the business to B. by defendant, and as the latter was present himself superintending the establishment in person, it will not be presumed that B. was the representative of defendant, and he was liable for his neglect and want of care. L. R. (1 S. & I., apps.), 326; L. R. (2 Q. B.) 33; 19 C. B. N. S., 361; 16 id., 669, 692.

A master is not liable to his servant for the negligence or want of proper care of a fellow servant who has not been negligently appointed or retained in service. 2 N. Y. 562; 3 M. & W., 1; 55 N. Y., 608; and it makes no difference that the servant injured is inferior in grade and subject to the orders of the negligent servant if both are engaged in the same general business. 39 N. Y., 468; L. R., 2 Q. B., 33.

Where the master has left the control of his business to an employe, reserving to himself no discretion, or where the business is of such a nature as that it is necessarily committed to agents as in the case of a corporation, the principal is liable for the neglect or omission of duty of the one thus representing him.

Judgment of General Term affirming judgment on verdict for plaintiff reversed, and new trial ordered.

Opinions by *Allen* and *Folger, J. J.*, and *Church, Ch. J.*, dissenting.

MORTGAGE. UNRECORDED DEED. PRIORITY. POSSESSION.

N. Y. COURT OF APPEALS.

Brown, applt. v. Volkening et al, impleaded, &c., *respls.*

Decided February 1st, 1876.

An actual, visible and open possession of the premises by the owner of an unrecorded title, is necessary to avoid the lien of a subsequent mortgage executed by the owner of record; an equivocal, occasional, special or temporary possession will not take the case out of the operation of the registry laws.

This was an action for the foreclosure of a mortgage given by defendant, D., to plaintiff, August 8, 1872. The answer of the defendant, V., set forth that in January, 1872, he contracted with D. to purchase the premises in question for \$30,000, subject to two mortgages amounting to \$21,000, which he was to assume, and the remaining \$9,000 he was to pay by making alterations and improvements in nineteen houses D. was building, of which the mortgaged property was one; D. agreeing to have the house sold, finished, and to give the deed of it by May 1, 1872. That previous to May 1, 1872, V. performed \$24,000 of work on the other houses, and more than fulfilled his agreement to the satisfaction of D., and that D. at that time gave him possession and he took pos-

cession, and has put large improvements on the property. The evidence showed that D. gave to V. an unsigned deed of the premises in April, 1872, and that this was not executed until the November following, and that he gave to V. the keys of the house in June, 1872, and that V. had mechanics and laborers in the house performing work, which was in substantial compliance with his agreement with D. for work upon the nineteen houses, although the work put upon this house was of a better character and more expensive than he had put upon the other. It did not appear that V. accepted the house from D. as finished, until long after the mortgage was given to plaintiff, but that until late in the Fall of 1872 V. was urging D. to complete the house as agreed, and complained that it was not done, and did not accept the deed until November, 1872. The house was unoccupied until long after the mortgage to plaintiff. The case was tried before the court, without a jury, and the judge found as a fact D. had surrendered the keys of the house to V. June 15, 1872, prior to the execution of plaintiff's mortgage, and that V. had entered into and had exclusive possession of the premises as purchaser under and in pursuance of the agreement, and was entitled to a conveyance thereof from D. free from any such incumbrance as the plaintiff's mortgage; that V.'s possession, at the time of the execution of that mortgage was actual and exclusive, and could have been easily ascertained by inquiry on the premises, and that such possession was notice to plaintiff of V.'s rights, and that plaintiff's lien was not valid as against V.

Amasa J. Parker, for applt.

Samuel Hand, for respts.

Held, error; that neither the findings nor the evidence showed an actual, visible occupation by V., such as is required to take the case of a prior recorded lien out of the operation of the registry laws, but merely a constructive possession of an un-

occupied house; that there was nothing to indicate any difference in the proprietorship between this house and any of the others, and that the lien of plaintiff's mortgage was paramount to V.'s title. The protection given by the registry laws to those taking title upon the faith of the records should not be taken away except upon clear proof of a want of good faith in the party claiming such protection, and a clear equity in him seeking to establish a right in hostility thereto. There should be proof of actual notice of prior title or equities, or of circumstances which should put a prudent man upon inquiry. Possession to have this effect must be actual, open and visible, not equivocal, occasional, or for a special and temporary purpose. 3 Ker, 180; 2 Barb. Ch., 555; 2 Paige, 30; 2 Mass., 508; 6 Wend., 213; 3 Barb. Ch., 316; 20 N. Y., 400.

The using of lands for pasturing or for cutting timber is not such an occupancy as will charge a purchaser with notice. 3 Dutch, 357; 3 Pick., 149; 10 N. J. Eq., 419; 23 N. Y., 252.

Also held, That V. was a proper party, and his rights could properly be determined in this action.

Judgment of General Term, affirming judgment for defendant reversed, and new trial granted.

Opinion by *Allen, J.*

NEGOTIABLE PAPER.

N. Y. COURT OF APPEALS.

Barlow, et al., respts. v. Myers applt.

Decided January 25, 1876.

A general promise for a valuable consideration to pay all the debts of another, if it inures to the benefit of the promisee's creditors, applies only to those who were such at the time the promise was made, and any one thereafter taking the promisee's outstanding note by endorsement from a then creditor, takes it subject to all equities between the endorser and promisor, even though it may be taken for value before maturity.

This action was brought to recover the amount of three promissory notes made by the firm of R. & W., payable to the order of N. R., and by him endorsed to plaintiffs before maturity. Plaintiffs claimed to recover upon a promise of the defendant to pay the firm's debts. It appeared that R. & W., being largely indebted to the estate of A. M., of which defendant was sole executrix, sold to her the firm assets in payment of such indebtedness, without specifying the debts or naming the creditors, she agreeing to pay the debts of said firm to the amount of \$22,000.

When this agreement was executed N. R. owed the notes in question, and defendant set up in her answer and offered to prove upon the trial, as a set-off, a note of \$5,000, held by her against N. R. This evidence was rejected.

D. Pratt for applt.

Jos. Larocque for resp't.

Held, Error. That assuming that the principle of the case of *Lawrence v. Fox*, 20 N. Y., 268, applied, and that an action might be maintained by a firm creditor upon the promise, it was to pay the creditors who were such at the time the promise was made, and they thereby acquired an additional security for the payment of their claims; and while this security would, upon an assignment by a creditor of his claims, pass as an incident thereto, yet the assignee takes it by derivative title from the assignor, and subject to the equities between the latter and the promisor.

The rights of a transferee forbid us before maturity of choses in action to hold them freed from the equities existing against them in the hands of a prior holder attaches only to negotiable instruments, not to guarantees thereof, and securities therefor contained in separate instruments. 19 Wend., 557; S. C. 26 id. 425.

Judgment of General Term, affirming

judgment on report of referee in favor of plaintiffs reversed, and new trial granted.

Opinion by *Andrews, J.*

PRACTICE. APPEAL.

N. Y. COURT OF APPEALS.

In re application of N. Y. C. and H. R. R. R. Co. for appointment of Commissioners to appraise lands, *applts.*, v. *Cunningham, et al., respts.*

Decided January 25, 1876.

An order of the Special Term vacating an order confirming the report of commissioners appointed to appraise land sought to be taken for public purposes is discretionary. It may be reviewed at General Term, but is not appealable to this court.

The Supreme Court has the power to vacate such an order.

This was an appeal from an order of General Term, affirming an order of Special Term, vacating an order confirming the report of commissioners appointed to appraise certain lands sought to be taken by appellants for railroad purposes, and appointing new commissioners. The railroad company claimed that by the confirmation of the report of the commissioners, the title to the property taken became so vested in them as to make the order vacating it an unauthorized exercise of power.

A. P. Laning for applt.

Spencer Clinton for resp't.

Held, That the order of the Gen'l Term was not appealable; that the right of the company to the land, if any, was the result of the proceedings, and depended upon the upholding of them, and they having been declared invalid, no such right existed; that the court had power to revoke the appointment of the first commissioners for good cause shown, and to set aside the confirmation of their report, and to appoint other commissioners.

The Special Term in vacating the prior

order was exercising its inherent power over the proceedings of the court.

The power to institute, control and review the proceedings of commissioners in street opening cases, and in taking lands for railroad purposes, is given to the Supreme Court as a court, and not to the Judges thereof in such way that they must act as a tribunal of inferior jurisdiction, created by statute, or as commissioners appointed by the legislature. 11 N. Y., 276; 2 id., 406; 40 How Pr., 335. The Supreme Court at Special Term has power in dealing with these cases to control all the proceedings had before it, and to set them aside on sufficient cause shown. 49 N. Y., 150.

Upon a motion to set aside an order confirming a report of commissioners, or an order appointing them, the court is to judge whether sufficient cause is shown; and whether it shall be granted, is a question of discretion, where there is not an entire lack of merits. The exercise of that discretion may be reviewed at General Term, but not in this court. 56 N. Y., 72; R. & S. R. R. v. Davis, 43 N. Y. 137. It is good cause for the Special Term to set aside the proceedings in such cases if the commissioners had been guilty of such carelessness or irregularity as amounted to misconduct by which a party had been harmed; the same reasons which would lead to the setting aside of a verdict of a jury or a report of a referee for misconduct, palpable mistake or accident, would suffice for like interference with the report of commissioners.

Appeal dismissed.

Opinion by *Folger, J.*

PARTIES. LIABILITY.

N. Y. SUPREME COURT—GEN'L TERM
FOURTH DEPT.

Story, respt. v. Evans, applt.

Decided January, 1876.

A partner is not liable for goods ordered by his copartners, on his individual account, where the goods, by mistake, were delivered to the firm, if immediate notice is given the vendor.

Appeal from judgment on report of referee.

J. H. Salisbury, in his own name and on his own account, ordered some whiskey of plaintiff. He was the senior member of the firm of J. H. Salisbury & Co., composed of Salisbury and defendant, and that firm had previously had dealings with the plaintiff, and purchased whiskey of him for the use of said firm.

Plaintiff filled the order by the shipment of the whiskey to the firm of Salisbury & Co., and it was delivered to Salisbury at his store, which was the common place of business for Salisbury, and for the firm of Salisbury & Co. On receipt of the whiskey at the store, with an invoice of the same, as sold to J. H. Salisbury & Co., it was discovered that the plaintiff had made a mistake, and Salisbury gave immediate notice thereof, and advised him said goods were ordered for J. H. Salisbury and not for J. H. Salisbury & Co.; that said Salisbury ran the drug store alone, and only had a partner in the butter trade, and directed him to charge the goods to him.

A. Storm, for applt.

Lanning & Willet, for respt.

Held, The plaintiff was not at liberty to regard the goods as sold to J. H. Salisbury & Co. If after the receipt of this notice he was unwilling to trust Salisbury as the purchaser of the goods on his individual credit and account, he should have immediately reclaimed the same. His omission to do so was an assent on his part to treat the sale as a sale made to Salisbury individually, according to the original order and his subsequent notices.

Judgment reversed.

New trial granted.

Opinion by *E. Darwin Smith, J.*

PERJURY.

SUPREME COURT OF ILLINOIS.

Van Dusen v. The People.

Decided February, 1876.

An extra-judicial oath is no ground for indictment for perjury.

Error to Carroll.

Indictment for perjury in making an affidavit before a tax assessor. It did not appear whether the oath was administered in the township wherein the assessor was elected.

Held, That an oath administered outside the township of the assessor would be extra-judicial, as the statute gives him no official power outside of his territorial limits; and, however false such an oath might be, it would not support a charge of perjury. The place of administering the oath must be shown to be within the territorial limits of the official authority of the officer.

Conviction reversed.

Opinion by *Walker, J.*

PRACTICE. PLEADINGS.

N. Y. SUPREME COURT, GENERAL TERM—
FOURTH DEPT.

Johnson v. White.

Decided January, 1876.

No reply is necessary where the answer sets up merely that plaintiff is not the real party in interest.

This was an action to foreclose a mortgage.

In his complaint plaintiff alleges that he is the owner of the bond and mortgage in suit.

Defendant, in his answer, alleges that one P. was the owner of the bond and mortgage in suit, and that plaintiff was not the real party in interest. Plaintiff did not reply to the answer. On the trial defendant proved that plaintiff had assigned the bond and mortgage in suit to P., and after some other proof rested.

Plaintiff then offered to prove that P. had re-assigned said bond and mortgage to plaintiff, and the Court refused to allow the proof on the ground that there are no allegations in plaintiff's pleadings admitting of such proof.

Held, That the proof offered, even under the pleadings as they stood, was competent.

The defense set up in defendant's answer, if proved, was a good one; and had plaintiff been allowed to prove that P. had re-assigned said bond and mortgage to him before suit, such defense would have been avoided and plaintiff entitled to maintain the action. No reply to defendant's answer was necessary; and being unnecessary, the allegation as to plaintiff's want of title was denied for all the purposes of the action, and plaintiff was entitled to give any evidence that avoided the new matter in the answer; defendant having proved the assignment to P. it was competent for plaintiff to prove the assignment.

Judgment reversed.

Opinion by *Mullen, P. J.*

QUO WARRANTO.

CONNECTICUT SUPREME COURT OF ERRORS.

State *ex rel.* Harvey Woodford v. Joseph B. North, and others.

Decided February, 1875.

The question whether a territory claiming to be a school district, is a legally existing district, cannot be tried, upon an information in the nature of a quo warranto against the persons elected as a committee of the district.

Information in the nature of a *quo warranto*, charging the defendants with usurping the office of school district committee within a certain area described in the information. The school district described in the information, and of the school committee, of which the relator is

a member, embraces what was formerly two school districts of the town of Avon, known as the second and fifth districts, and by certain proceedings, authorized by statute, those two districts were consolidated into one, now called the second district. The inhabitants of the old second district were dissatisfied with the proceedings and adopted certain measures which they claim to have been authorized by a special act of the General Assembly for the dissolution of the two consolidations, and the re-establishment of the old districts. The legal validity of these proceedings is denied by the relator, who claims that the only legal district within the territory is the consolidated or new second district.

The inhabitants of the old second district held their annual meeting as such in October last, and elected the defendants a committee of the district, and they are now claiming to be, and are acting as a committee of the old second district, and do not claim to be a committee of the consolidated or new district.

Defendants pleaded that they did not claim to exercise the office in the new consolidated district, and as to the old second district they were legally elected.

Demurrer by the State, and judgment below in its favor.

Held, 1. The proceeding assumed the continued legal existence of the new consolidated district, and that defendants' plea that they did not claim the office was a perfect answer.

2. But if the proceeding was to oust them from office in the old second district, their answer that they were duly elected was good.

3. That if the old district was not now a legally existing district, the defendants were not legal officers, and a *quo warranto* will not lie to try the right to an office that is not a legally authorized public office.

4. The legal existence of the district cannot be tried in this proceeding.

Judgment reversed.

Opinion by *Phelps, J.*

RECEIVER. CAPACITY TO SUE. ASSESSMENT ON STOCK.

U. S. DISTRICT COURT—SOUTHERN DISTRICT OF N. Y.

Edward L. Stanton, Receiver of the First National Bank of Washington, D. C., v. Catherine O. Wilkeson.

Decided February, 1876.

An action to recover an assessment on stock held by defendant may be maintained by the receiver of a national bank.

The U. S. District Court has jurisdiction of such an action.

A suit at law is the proper remedy.

Action by the receiver of the First National Bank of Washington to recover 60 per cent. assessment on 100 shares of the par value of \$10,000, held by defendant when the bank suspended. The bank was organized under the act of January 25th, 1863.

Defendant demurred to the complaint, and urged as grounds, first, that the plaintiff had no capacity to sue; that under Sec. 721 of the R. S. of the U. S., the laws of the State of New York govern, and that under Secs. 111 and 113 of the N. Y. Code, the plaintiff cannot maintain the action.

Second, That the United States District Court has no jurisdiction of the suit.

Third, That the proper remedy of the plaintiff is not by separate suits at law against the individual stockholders, but by a bill in equity.

Man & Parsons for piff.

Gray & Stanton for deft.

Held, 1. That by Section 5234 of the Revised Statutes, the receiver was authorized and required to sue; and that, under its provisions, neither the comptroller of the currency nor any one else can sue; that therefore the action was properly brought by the receiver.

2, That under Section 563 of the Revised Statutes, this court has jurisdiction, if the plaintiff is an officer of the United States, and that in view of the statutes under which plaintiff was appointed, he must be regarded as such officer.

3, That an action at law will lie against the individual stockholders, to enforce the collection of an assessment.

Demurrer overruled.

Opinion by *Blatchford, J.*

REFORMATION OF DEED.

N. Y. SUPREME COURT—GEN'L TERM.
FOURTH DEPT.

Caster respt. v. Sitts et al. applts.

Decided January, 1876.

A mistake in a deed can be corrected as between the parties to the conveyance, but not as against a bona fide purchaser without notice.

Action to reform a deed. Partition.

In November, 1864, one A. C. died intestate and seized and possessed of certain lands, and leaving him surviving his wife Barbara, Peter A., Elizabeth, Emma, Louisa and Fanny, his children.

Fanny died intestate, and without having conveyed her interest in said land, and without issue, &c.

Emma, Elizabeth and Louisa conveyed to Peter A. their interests, except their interest in the dower right of the mother and in the estate from their sister Fanny.

Dower was never set off to the widow.

Peter A. subsequently conveyed to one Uhle all his right, title and interest in said land, subject to, and reserving the dower right of the widow, Barbara.

Subsequent to this, the Uhles sold to widow Barbara the interest sold to Peter A., subject &c., to the right of dower of Barbara.

Subsequently all the parties in interest united in a conveyance of 64 acres of said land to one Caster, leaving 79 acres sought to be partitioned in this case.

Subsequently Peter A. conveyed to plaintiff his interest in the dower right of

his mother, and also in the share which descended to him from his sister Fanny.

Subsequent to this Barbara died, leaving a will by which she devised all her real estate to the defendant.

Plaintiff, in his complaint asks that the deed from Peter A. to the Uhles be reformed by inserting therein a reservation by the grantor of the share of said farm that descended to him from his sister Fanny, which it was the intention of the parties to that conveyance should be reserved, but which was omitted by mistake, &c. The complaint also asked for a partition. It was stipulated on the trial that if a reformation of the deed from Peter A. to the Uhles was desired then the rights and interests of the parties in the land were as stated in the decree.

The referee to whom the action was referred, found judgment and ordered reformation as asked, and directed a partition, &c.

Held, That that portion of the decree directing a reformation was erroneous; that defendant is to be treated as a *bona fide* purchaser of the interest of her mother, as her mother clearly was, without notice of any mistake. Mistakes between the same parties to the instruments, or transactions, may be corrected, but not as between others not in any way connected with such instrument or transactions.

No mutual mistake of the parties to the deed was proved, and in such a case there cannot be any reformation.

Judgment reversed.

Opinion by *Mullin, P. J.*

REPLEVIN.

CONNECTICUT SUPREME COURT OF
ERRORS.

Ogden Spencer v. Edmund D. Roberts
Same v. James G. Wells, et al.

February, 1875.

At common law and by statute of 1875, a right to immediate possession is

necessary to maintain replevin for goods unlawfully detained. Under statute of 1866, title was sufficient.

Two actions of replevin for goods unlawfully detained; brought to the City Court of the city of Hartford.

The defendants had attached, as the property of W. S. Spencer, a son of the plaintiff, certain hotel furniture owned by the plaintiff, and leased by him to the said W. S. Spencer. Judgment below, in both suits, for the defendants.

Held, It appears from the records in these cases that the plaintiff was the owner, but had not the possession, or the right to the immediate possession, of the goods which were replevied.

At common law, and by the present revision of the statutes, which has gone into effect since these actions have been pending, the right to the possession, accompanied by a general or special property in the goods, is vitally essential; but by sections 327, 337, and 341, of chapter 15, of title 1, of the revision of 1866, in force when these suits were commenced, the plaintiff seems only to be required to either make out a title as the true owner, or show that he is entitled to the immediate possession. There is error in the judgment complained of.

Opinion by *Phelps, J.*

REPLEVIN. DEMAND. REFUSAL.
N. Y. SUPREME COURT, GENERAL TERM—
FOURTH DEPT.

Bradly v. Cole.

Decided January, 1876.

A refusal based upon one ground to deliver personal property to one claiming it, is a waiver of all other objections to a delivery, which cannot afterwards be abandoned and others insisted upon.

Plaintiff brought an action and replevied a wagon. Before suit brought plaintiff made a demand, and defendant refused to deliver the wagon, on the ground that

one of plaintiff's vendors was indebted to defendant, and refused to deliver the wagon until the defendant was paid, and put their refusal to deliver on no other ground.

In their answers on the trial defendants insisted and proved that when plaintiff's vendor sold the wagon to plaintiff, such vendors had no title thereto, and could not sell the same.

Held, That the ground on which the defendants based their refusal being wholly untenable they waived all others, and cannot be allowed afterwards to abandon it and insist on another and different ground on which they claimed to hold the property.

Judgment reversed.

Opinion by *Mullin, P. J.*

REPLEVIN. DEMAND. FIXTURES.

SUPREME COURT OF KANSAS.

Shoemaker et al. v. Simpson.

Decided December, 1875.

No demand is necessary to maintain replevin where defendants' possession is illegal and wrongful.

An owner of personal property can not, against his will, be deprived of the title to the same, by having it attached, without his consent, to the real estate of another, by a third person, where such personal property can be removed from such real estate without any great inconvenience, and without any substantial injury to the real estate.

This was an action of replevin brought by Shoemaker, Miller & Co., against S. M. Simpson and others, for the recovery of twenty-six bars of railroad iron.

Originally, Shoemaker, Miller & Co. owned a large lot of railroad iron (including such twenty-six bars), at the State line, near Wyandotte, Kansas. They intended to use the iron in building a railroad, which they had previously agreed to build for the Kansas Pacific Railway Company (then Union Pacific Railway Company, Eastern Division), from Junction

City, westward. They employed the Kansas Pacific Railway Company to transport the iron from the State line westwardly, to the place where they expected to use it. At the same time William A. Simpson (one of the defendants), owned certain town lots in the city of Lawrence, Kansas, on the north side of the Kansas river, and between the river and the Kansas Pacific Railway. Previously a railroad track had been constructed across such lots, from the Kansas Pacific Railway to the river. But at this time the iron which had originally been put on this track had been removed therefrom, and only the road-bed and cross-ties then remained. About this time, the Kansas Pacific Railway Company, or its agents, took the twenty-six bars of iron from the iron of Shoemaker, Miller & Co., at the State line, transported them to Lawrence, and there spiked them on the cross-ties on the lots of William A. Simpson. This was done by the Kansas Pacific Railway Company, or its agents, for the temporary purpose of obtaining some ninety car loads of sand from the Kansas river; and it was intended to remove the iron as soon as the sand was obtained. This was all done without the knowledge or consent of either Shoemaker, Miller & Co., or William A. Simpson. The railway company had, however, taken other iron from Shoemaker, Miller & Co. for which they subsequently settled, but the parties never settled for this particular iron; and Shoemaker, Miller & Co. objected to the railway company taking or using their iron in any such manner. Afterwards, William A. Simpson, through his agents, removed the twenty-six bars of iron from the lots, claiming it to be his iron. Shoemaker, Miller & Co. then commenced this action and replevied the twenty-six bars of iron from William A. Simpson and his agents, the other defendants.

Plaintiffs made no demand for the property before commencing the action.

The defendants claimed that the prop-

erty became theirs by reason of its being spiked down to the cross-ties, and being thus made a part of the realty, which belonged to them.

Judgment below for defendants.

Held, 1. That the plaintiffs being innocent of all wrong in the premises could not be thus deprived of their property; that whilst in some cases iron attached to the road-bed would become a part of the realty, clearly it was not so here. It was taken against their consent, attached to the road-bed against their consent, by a third person, and it may be removed without any great inconvenience and without substantial injury to the land.

2. No demand was necessary. Defendants' possession was without authority from the owners and inconsistent with their rights, and was therefore illegal and wrongful.

Judgment reversed.

Opinion by *Valentine, J.*

R. R. DAMAGES—CONTRIBUTORY NEGLIGENCE.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Hill, admr., *Respt.*, v. The New York Central and Hudson River R. R. Co.,
Appls.

Decided January, 1876.

The question of contributory negligence is one for the jury.

Refusal to charge.

Court should not set aside a verdict of a jury except upon clear and palpable evidence of fraud, bias, or prejudice.

This action was brought for damages for the death of plaintiff's wife.

Plaintiff and his wife were driving in a buggy, and in crossing defendant's track the buggy was struck by one of the defendant's trains and plaintiff's wife was killed.

On the trial defendant's counsel re-

quested the Court to charge the jury "that notwithstanding plaintiff stopped his horse, and looked and listened when at a distance of sixteen rods from the crossing, yet, when he came to a point where he could again look, he was bound to look, and to keep up that looking, down to the time when he reached the track, and if he omitted to do so, he is chargeable with negligence, and that he was bound to put himself in a position, so far as his vehicle was concerned, so that he could look.

The Court refused to so charge, and plaintiff's counsel excepted.

There was a verdict for the plaintiff.

A motion was made to set the verdict aside, which was denied.

Appeal from order denying new trial and for judgment.

E. Harris, for applt.

J. H. Martindale, for resp't.

By the Court: *E. Darwin Smith, J.* None of the exceptions taken on the trial are, we think, well taken. The motion for a nonsuit at the close of the plaintiff's case, and also at the close of the evidence, were made upon the ground that the negligence of the plaintiff's intestate contributed to the injury. This was a question which properly belonged to the jury, in view of all the facts of the case. The point was not taken that the plaintiff was bound to prove affirmatively that his intestate was free from negligence.

The refusal of the Circuit Judge to charge as requested in respect to the duty of the plaintiff's intestate to continue to listen and to look for trains coming from the west on the defendant's road was not error. The judge had charged fully on that subject in respect to the duty of the plaintiff's intestate, and it was not error for him to refuse to vary his charge.

The charge of the judge, upon the whole case, was full and clear, and presented the case to the jury upon fair and proper grounds. The question of negligence in such cases is peculiarly one for a

jury upon the whole evidence and circumstances of the case, and it is not the province of the court to overrule their decision except upon clear and palpable case of mistake, bias or prejudice, and when their verdict is essentially unjust and unwarranted.

The motion for a new trial should be denied.

New trial denied.

STOPPAGE IN TRANSITU.

PENNSYLVANIA COMMON PLEAS, LUTHER COUNTY.

Gallagher v. Whitaker.

Decided February 16, 1876.

Delivery of goods by a vendor to a carrier is a delivery to the vendee. But until the transitus is completely ended, the vendor has a right to stop them in transitu, if the vendee was insolvent at the time of the purchase, whether it was known to the vendor or not, no right of stoppage exists.

Action for damages for conversion.

Defendant, as sheriff, seized under process certain goods consigned to one S. At the time of the seizure they were in the possession of plaintiff's agent, who had taken them from the carrier under a claim of right to stop in transitu, and also upon the ground that they had not been sold. They had, when plaintiff took them, reached the point where the carrier was to deliver them, and had been in the carrier's warehouse about a month. S. never called for the goods.

The court left it to the jury to say whether or not there had been a sale, and charged that delivery to the carrier was a delivery to S., but that plaintiff had a right to stop the goods in *transitu* if, after the sale, and before delivery, S. became insolvent or bankrupt; but that if he was insolvent at the time of the sale, whether that fact was known to defendant or not, the right to stop did not exist.

Whether or not there was a delivery to S. was also left to the jury.

Verdict for plaintiff.

Held, Case was properly submitted and the charge correct.

Opinion by *Handley, J.*

SUSPICIOUS CIRCUMSTANCES. JURY.

N. Y. SUPREME COURT, GENERAL TERM
—FIRST DEPARTMENT.

Franklin W. Brooks, *applt.* v. Chr. A. Steen, impleaded, &c., *resp't.*

Decided January 28, 1876.

When the plaintiff has knowledge of the transaction in controversy, which is the subject of the action, and is not called as a witness, it is not error in the Judge to submit to the jury the plaintiff's absence for them to consider, and it is not error for the Judge to instruct them that if they find such absence to be of a suspicious character, that it would throw suspicion upon plaintiff's case.

Appeal from judgment entered on verdict.

The plaintiff brought this action upon a note given to himself, made by the defendant, Steen, and signed with his name. He alleged that the note was in fact made by all the defendants as copartners, and in substance that the name, Christian A. Steen, was their firm name.

The answer was a general denial, and a further allegation that the services for which the note was given had been fully paid. The evidence with reference to the name of the copartnership, and with reference to the transaction for which the note was given, to wit: the obtaining the discharge of a distillery from seizure, was very conflicting. The plaintiff was not called as a witness, although it appeared

he was familiar with the transaction with reference to the giving of the note. The Judge, in his charge to the jury, said: "That is a circumstance for you to consider, whether Brooks' absence is a suspicious circumstance. If you find it is, and that it was his duty to have testified and given you all he might know in regard to the transaction, then you must assume that the reason he has not done so is that he was afraid to do so, and it must be taken as a suspicious circumstance, certainly throwing suspicion upon his case." This portion of the charge was excepted to. The jury rendered a verdict for the defendant.

Held, That the Judge's charge, with reference to the absence of the plaintiff as a witness was not erroneous. That the Judge was quite right, under all the circumstances of the case, in submitting to the jury the plaintiff's absence as a circumstance for them to consider, and in instructing them that if they found such absence to be of a suspicious character, it would certainly throw suspicion upon his case. The plaintiff must be presumed to have known that his case was on trial, and in the absence of evidence tending to explain his non-attendance by reason of inability from any cause, there is no reason for finding fault with the presumptions which the court allowed the jury to indulge. The case is within the principle laid down by the court in *Gordon v. The People*, 33 N. Y., 501; and the *People v. Dyer*, 21 N. Y., 578.

The judgment must be affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

ERRATA.

On page 48, vol. 2, line 19, for "sold" read "sued."

NEW YORK WEEKLY DIGEST.

VOL. 2.] MONDAY MARCH 13, 1876. [No. 5.

PRACTICE. EXAMINATION OF PARTY.

N. Y. COURT OF APPEALS.

Glenney, *respt.*, v. Stedwell, et al., *appls.*
Decided February 1, 1876.

Under Sec. 391 of the Code, the plaintiff may examine the defendant before issue joined, and before the service of the complaint.

Supreme Court rule 21, if intended to affect this right, is inoperative.

If the affidavit upon which the application is based gives the Judge power to act, his action is discretionary, and cannot be reviewed by this Court.

This action was commenced by the service of a summons for relief, no complaint being served. Immediately after its commencement an order was obtained under Sec. 391 of the Code; upon plaintiff's affidavit, directing the defendants to appear and be examined as witnesses in the action, and a summons was issued to each of them, requiring them to appear and give testimony. On the return day defendants appeared and moved to vacate the proceedings on the ground that the examination could not be had under the Code until after issue joined, which motion was denied, and the examination ordered to proceed.

F. N. Bangs for *appls.*

Robert Sewell for *respt.*

Held, No error; that a plaintiff, under the provisions of Sec. 391 of the Code of Procedure, in an action pending, may examine the adverse party on oath, before the service of a complaint on him, and for the purpose of obtaining the facts on which to frame a complaint.

A court of equity has, as a general rule, jurisdiction to entertain a bill for the discovery of facts which may aid in the prosecution or defence of an action in another court, and which may enable the plaintiff

to ascertain who will be proper parties to that action. 1 Bro. Ch. 469; 2 Dick, 652. The bill may be filed when the plaintiff has become actually involved in the litigation, or when he is only liable to be so, and whether he has or has not yet commenced his action. Adams Eq. 86, 87; 2 Story's Eq. Jur., Secs. 1483, 1495; 8 ves. Jr., 404. This jurisdiction was conferred upon the Supreme Court by the Constitution of 1846, Art. vi., Sec. 3, and it is not to be supposed, unless the terms of the enactment are clear, that it was the intention of the legislature to abolish it.

Also *Held*, That the change in the phraseology of Supreme Court rule 21, as adopted by the Convention of Judges in 1874, if intended to affect this right, was inoperative, as the rule cannot alter the statute, and the latter must be interpreted and followed. 54 N. Y., 518.

Also *Held*, That if the affidavit upon which the order was based disclosed such a case as gave the judge power to act, his action was discretionary with him, and cannot be reviewed here; that the fact that said affidavits disclosing that plaintiff was so far conversant with the facts as to be able to state a good cause of action, did not deprive him of his rights to such examination.

Order of General Term affirming order of Special Term, directing an examination under section 391 of the Code, affirmed.

Opinion by *Folger, J.*

NATIONAL BANKS. POWER TO SUE.

U. S. CIRCUIT COURT—NORTHERN DISTRICT OF OHIO.

The Commercial National Bank of Cleveland, Ohio, v. Simmons, et al.

Decided January, 1876.

A National Bank may sue a citizen of the district in which it is located, upon a promissory note endorsed by such citizen, in the United States Courts for that district.

This suit is brought on two promissory notes payable to the order of J. G. Simmons & Co., and endorsed to the plaintiff.

The petition states that the plaintiff is a corporation existing under the laws of the United States, and does not state that the payee of the notes is not a citizen of Ohio.

The defendants, Thompson and Mills, demur to the petition, and assign three grounds of demurrer.

1st, That it appears on the face of the petition in each of said causes of action, that the court has no jurisdiction of the defendants, or either of them, or of the subject of the action.

2d. That the plaintiff and its assignor are both residents of the State of Ohio, and of said district, and have no legal right to bring suit against the defendants in this court.

3d. For other good and sufficient reasons appearing on the face of the petition.

This demurrer raises two questions:

1st. Whether the plaintiff can sue in this court, being located in the State of Ohio, and in this district.

2d. Whether, under the Judiciary Act of 1789, and the limitation of the 11th section thereof, the plaintiff can sue in this court upon the promissory notes in petition described, the assignor thereof to the plaintiff, being a citizen of the State of Ohio, and of this district.

Held, That a National Bank does not sue in virtue of any right conferred by the Judiciary Act. but in virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter. The charter of the old United States bank was but a law, as this general act is a law, of the United States.

That the Judiciary Act does not control the right and power of these banks to sue in the federal courts.

Demurrer overruled.

Opinion by *Welker, J.*

TRUST DEED. SALE UNDER.

SUPREME COURT OF ILLINOIS.

Solt *et al.* v. Wingart.

Decided February 4th, 1876.

The holder of a sheriff's certificate of sale under judgment, which had run only fourteen months, is not entitled to the surplus moneys arising on a sale under a trust deed, which had been recorded prior to the judgment.

Appeal from Stephenson County.

On the 10th day of January, 1871. Solt executed a deed of trust to John Hart, on seventy acres of land, to secure the payment of a note of \$350 he owed to one Cyrus A. Shutz, due in two years from that date. About two months thereafter, Wingart recovered a judgment against Solt for about \$207 17, including costs. In October of that year, he caused an execution to be issued on the judgment, and had the sheriff to levy it on the land, and offered it for sale, and Wingart became the purchaser at \$234 12, the amount of his judgment and costs, and received a certificate of purchase therefor. The note to Shutz fell due on the 10th of January, 1873, and after advertising the time and place of sale, Hart, the trustee, offered it on the 9th of April, 1873, and one Thomas K. Best became the purchaser at \$1,000; and having paid the money, received a deed from the trustee. As soon as the land was struck off at the sale, and before the money was paid to the trustee, Wingart's attorney showed to the trustee the certificate of purchase, and demanded for Wingart the surplus over and above the amount necessary to pay the debt the trust deed was given to secure, and the costs and expenses of the sale.

This the trustee declined to do, but paid the debt to Shutz, and the expenses of the sale. The surplus amounted to \$543 60, a part of which the trustee paid, under directions of Solt, to one of his creditors, and the remainder to him.

Wingart thereupon filed a bill against Hart, the trustee, and Solt, to compel the

payment of the entire surplus to him. On a hearing in the court below, the relief was granted, and Hart was decreed to pay it to Wingart, and that Solt pay the costs; and from that decree they appeal to this court.

By the statute, the purchaser under execution was not entitled to a sheriff's deed until the expiration of fifteen months.

Held, All the appellee acquired by his purchase was a lien; that it had never ripened into a title, and that it was cut off and wiped out by the sale under the trust deed, and was not transferred to the surplus; that equity will not intervene, as the appellee stands in no better position than every other honest creditor. The mere fact that he had a judgment places him in no better position than a contract creditor.

Decree reversed.

Opinion by *Walker, J.; Sheldon, Craig and Dickey, J. J.*, dissenting.

PRACTICE. ATTACHMENT. APPEALABLE ORDER.

N. Y. COURT OF APPEALS.

Sutton, applt. v. Davis, exr., &c., respt.

Decided February 8, 1876.

An order granting or refusing an attachment for contempt is not appealable to this court,

This was an appeal from an order of General Term, affirming an order of Special Term, denying a motion for an attachment against defendant as executor of the last will and testament of M, for refusing to obey a former decree and supplemental order of said court, which decree directed that defendant should pay over to plaintiff certain of the estate, and a certain sum for the funeral expenses paid, the order directed that the decree should remain unchanged, save that the sale therein directed should be public instead of private, and refused to modify it so that defendant should account in Surrogate's Court. The order appealed

from refused the attachment, for the reason that the amount defendant was directed to pay was not specified or definite, and for the purpose of ascertaining the amount defendant should pay, directed that it should be referred to a referee to take an account.

A. J. Reginer, for applt.

Moses Ely, for respt.

Held, That the part of the order refusing an attachment was not appealable to this court; that there was no right in the moving party to have his opponent punished; that it was a matter of discretion with the court below; that the order of the Special Term did not infringe upon the provisions of the decree and previous order; that it was within the power and discretion of the Special Term, and is not appealable.

Appeal dismissed.

Per curiam opinion.

FIRE INSURANCE.

SUPREME COURT OF ILLINOIS.

The Fireman's Fund Ins. Co. v. The Congregation of Rodeph Sholem.

Decided January 21st, 1876.

An insurance policy containing a provision that "if the building shall fall, except as the result of fire, all insurance by this company shall immediately cease and determine," continues in full force where the building, although removed from its foundation by the violence of a tempest, and greatly damaged, is still intact as a building.

Appeal from Cook county.

The building was a church edifice, and stood upon blocks or posts. By the violence of a tempest, which occurred shortly prior to the fire, the building was blown partly off the posts upon which it rested, was greatly damaged, and considerably out of plumb. So much was it injured that it could not be used, and part of the furniture was removed. The company

claimed, under a clause in the policy, "if the building shall fall, &c., that it was not liable.

Verdict for plaintiff.

Held, That the edifice as a building remained intact; that the policy was not avoided by the fact that the building was removed from its posts, and that to bring a case within the terms of the policy the building must be reduced to a mass of rubbish, to such a condition as to lose its identity as a building.

Judgment affirmed.

Opinion by *Scott, C. J.*

SHERIFF.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Weld applt. v. Conner, Sheriff, &c., 1st National Bank of Tarrytown, 1st National Bank of New Bedford, Poor, Bowen, French, and Leaman.

Decided January 25, 1876.

Sheriff has a right to pay money into Court where there are contesting claimants to it.

Court may direct him so to do.

Appeal from an order directing the Sheriff to pay money into Court.

Several judgments were obtained against defendant. Poor, in actions in which attachments were issued. He held judgments against Bowen, on which executions had been issued. Bowen paid into the Sheriffs hands the amounts of these executions (and moved the Court that the same be satisfied and discharged, which was ordered).

The fund created by this payment is claimed in whole or in part by the several judgment creditors; also, by French as Poor's attorney, for his costs and fees in the action against Bowen, and by Weld, the appellant, as assignee of Poor's judgments against Bowen.

The Sheriff applied for leave to pay the money into Court, and that the various

claimants interplead and determine their respective rights, and an order was made granting the leave asked.

Chas. S. Gage for Weld.

Barrett, Redfield & Hill, for First National Bank of Tarrytown.

Vanderpool, Green & Cumming, for Conner.

Nash & Holt, for Bowen.

Weeks & Forster, for Leaman.

Stanley, Brown & Clarke, for 1st National Bank of Commerce of New Bedford.

J. V. French, for Poor and in his own behalf.

On appeal. *Held*, That it seems apparent by precedent and by the long established practice of this Court, that the Sheriff has a right to pay the money into Court where there are contesting claimants to it, (59 N. Y., 224, 229), but whether this right rests in him or not, the power of the Court to *direct* that he do so, cannot be questioned, nor can the propriety and justice of making such an order be well doubted.

Order affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

EXECUTION AGAINST THE BODY.

N. Y. SUPREME COURT, ONEIDA SPECIAL TERM.

Joseph Bieler, et al., v. John Reh.

Decided Feb 26, 1876.

In an action to set aside a mortgage as void for usury, if the plaintiff succeeds in obtaining judgment for relief and costs, an execution against the body of the defendant is justifiable; the action sounding in tort, being based on the fraud of the defendant.

On the 11th day of May, 1875, the plaintiffs entered and docketed their judgment setting aside and cancelling a mortgage, given to the defendant Reh,

on the ground of usury, &c., and for costs. The execution against the property of the defendant having been returned unsatisfied, the plaintiff issued an execution against the body of the defendant. They had obtained an injunction, at the commencement of the action, restraining the defendant from selling the mortgaged premises in foreclosure proceedings under the statute, instituted by him, but no order of arrest; and relied on the causes of action set forth in the complaint, for justification of the issuing of the execution against the body of the defendant. The defendant, after staying on the jail limits for some time, presented a petition for his discharge to the County Court; the prayer of his petition was denied, because his proceedings were not fair and just. He now makes a motion to set aside and vacate the execution against his person, and to release him from imprisonment thereunder, on the grounds that the causes of action, stated in the complaint, did not warrant the issuing of an execution against the person, and that said action is not one in which an execution against the person can be issued.

W. & J. D. Kernan for defendant.

C. L. DeGiorgi for plaintiffs.

The only point made on this motion is, that in an action to set aside a mortgage as void for usury, the defendant cannot be arrested under section 179 of the Code, and that therefore an execution against the body cannot issue.

In *Schroeppel v. Corning*, 5 Den. 236, it was held that a cause of action accruing to the borrower under the usury law, sounded in tort; was based on the fraud of the defendant. This doctrine was affirmed by *Paige, J.*, in 2 Seld. 101—same case in Court of Appeals. See also *Whelock v. Lee*, 15 Abb. N. S. 24. Arrests for wrongs are permitted. *Bank v. Temple*, 39 How. 432.

Within the principle of the *Schroeppel* case I think the defendant could be ar-

rested under either the 1st or 3rd sub-div. of section 179.

Motion denied with \$10 costs.

Opinion by *Merwin, J.*

ASSIGNMENT FOR BENEFIT OF CREDITORS. BANKRUPT ACT.

U. S. SUPREME COURT.

Frederick J. Mayer et al., plffs in error
v. *Max Hellman, deft. in error.*

Decided January, 1876.

A general assignment for the benefit of creditors without preferences is not fraudulent or void, and, where executed six months prior to the filing of a petition in bankruptcy, against the assignor, is not assailable by the assignee in bankruptcy, nor can he recover possession of the trust property.

Error to the Circuit Court for the Southern District of Ohio.

The plaintiff in the court below is assignee in bankruptcy of Bogen and others, appointed in proceedings instituted against them in the District Court of the United States for the Southern District of Ohio; the defendants are assignees of the same parties, under the assignment laws of the State of Ohio; and the present suit is brought to obtain possession of property which passed to the latter under the assignment to them. The facts as disclosed by the record, so far as they are material for the disposition of the case, are briefly these: On the 3d of December, 1873, at Cincinnati, Ohio, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same parties with Henry Muller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy, to three trustees, in trust for the equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property was taken possession of by the assignees.

By the law of Ohio, in force at the time, when an assignment of property is made to trustees for the benefit of creditors, it is the duty of the trustees, within ten days after the delivery of the assignment to them, and before disposing of any of the property, to appear before the Probate Judge of the county in which the assignors reside, produce the original assignment, or a copy thereof, and file the same in the Probate Court and enter into an undertaking payable to the State, in such sum and with such sureties as may be approved by the Judge, conditioned for the faithful performance of their duties.

In conformity with this law, the trustees, on the 13th of December, 1873, within the prescribed ten days, appeared before the Probate Judge of the proper county in Ohio, produced the original assignment and filed the same in the Probate Court. One of the trustees having declined to act, another one was named in his place by the creditors and appointed by the court. Subsequently the three gave an undertaking with sureties approved by the Judge, in the sum of five hundred thousand dollars, for the performance of their duties, and then proceeded with the administration of the trust under the direction of the court.

On the 22d of June of the following year, more than six months after the execution of the assignment, the petition in bankruptcy against the insolvents was filed in the District Court of the United States, initiating the proceedings in which the plaintiff was appointed their assignee in bankruptcy. As such officer, he claims a right to the possession of the property in the hands of the defendants under the assignment to them.

The plaintiff below demurred to defendant's answer, which set up the facts before mentioned, and had judgment.

Held, 1. That the courts of this country have uniformly upheld assignments by debtors providing for a ratable distribution of their property among creditors;

that this assignment was valid and binding, and divested the assignors of all proprietary rights in the property conveyed, and more than six months having elapsed after its execution before proceedings in bankruptcy were initiated, it was a closed proceeding to the assignee in bankruptcy, and he could not now recover the possession of the property from the trustees.

2. That the Ohio State law under which the assignment was made, and which merely regulates the giving of security by assignees, and the means of compelling them to account, &c., was in no sense an insolvent law, and was not, therefore, suspended by the bankrupt act.

3. Whether or not the assignment, if executed within six months of filing the petition, would have been voidable, the court declines to say. Certainly it would not have been absolutely void.

Judgment reversed, and the cause remanded for further proceedings.

Opinion by *Field, J.*

EVIDENCE. PLEA IN BAR.

N. Y. COURT OF APPEALS.

Kerby, respt. v. Daly, applt.

Decided January 18, 1876.

Where a former judgment is pleaded in bar, extrinsic evidence that the claim in suit was not included in the judgment is admissible.

This action was brought to recover \$1,511 06 alleged to have been paid by plaintiff for defendant to one D., for slating the roof of defendant's nouse. It appeared that plaintiff, having filed a lien upon defendant's property for work, labor and materials done and furnished defendant, brought an action to enforce the same and claimed to recover, among other items, the amount of the bill for slating. A judgment was recovered for the full amount claimed, which was reversed by the Court of Appeals, and a new trial granted unless plaintiff consented to remit from the judgment the amount of the

slating bill on the ground that plaintiff could not, although he made the contract for the slating with D., as defendant's agent, include in his lien work and materials performed and furnished by D. Plaintiff stipulated to do this, and the judgment was thereupon affirmed under that contract. Defendant pleaded in bar the judgment in the mechanic's lien case. Upon the trial plaintiff offered in evidence the remittitur of the Court of Appeals in the former action, and it was received in evidence under defendant's objection.

J. O. Dykman, for resp't.

Closs & Robertson, for appl't.

Held, That this action was not barred by the judgment in the former proceedings; that it was proper to receive extrinsic evidence to show that the amount as to which the lien was disallowed was the claim upon which this action was brought, and that it was not embraced in the final judgment recovered in the former action.

Judgment of General Term, affirming judgment of Special Term for plaintiff, affirmed.

Opinion by *Andrews, J.*

MORTGAGE OF INCOME AND EARNINGS.

U. S. SUPREME COURT.

W. S. Gilman, et al., appl'ts., v. The Ill. and Miss. Telegraph Company, The Des Moines Valley Railroad Company, and others, resp'ts.

Decided October Term, 1875.

Under a mortgage upon railroad property, which purported to mortgage the income and earnings of the road, the mortgagee has no lien upon the income fund, which will prevent a judgment creditor from levying upon it under an execution.

Appeal from the Circuit Court of the United States for the District of Iowa.

This bill was filed to prevent, by injunction, the collection of the moneys upon a judgment in favor of the telegraph

companies. There is no controversy between the parties as to the facts.

The telegraph companies obtained judgment on June 13, 1872, and levied upon certain moneys received by an agent of the R. R. Co., from the sale of tickets and from freight.

On the 16th of February, 1857, the railroad company, by its then corporate name, executed a mortgage, and on the 1st of October, 1868, by its corporate name as altered, executed another. Both were given to secure the payment of its bonds as set forth. A part of the premises described and pledged by both mortgages, besides the road, was its income.

In case of default in the payment of interest or principal, the mortgagees were authorized to take possession and collect and receive the income and earnings of the road, and apply them to the debts secured, and upon the request of one-third of the bondholders to sell the mortgaged premises.

The condition of both mortgages having been broken, the mortgagees in the second mortgage filed their bill of foreclosure in the Circuit Court of Polk County, in the State of Iowa. The mortgagees in the first mortgage, various judgment and lien creditors, among the former the telegraph company, were made defendants. On the 31st of May, 1873, a decree of foreclosure and sale was rendered. It fixed the priorities of the several parties, and held that the judgment of the telegraph company was a lien subject to the mortgage in suit, and other specified liens. It ordered a sale of the mortgaged property. The road was still in possession of the company. The decree made no provision for disturbing their possession, and none whatever as to the income of the road between the time of the decree and the time of the sale.

On the 20th of June, 1873, the appellants, who are the trustees in the two mortgages, filed this bill. On the 9th of September, 1873, after the sheriff had

advertised the mortgaged premises for sale, the decree in the state court was amended by providing for the appointment of "a special receiver of all the income and earnings of the road" between the date of the decree and the time fixed by the sheriff for the sale to be made by him. This was done with a saving of the rights of the telegraph company. The special receiver took possession on the 15th of September, 1873. The sale by the sheriff was made on the 17th of October, 1873. The road was operated by the company up to the time when the receiver took possession.

During this period the fund was received upon which the levy was made.

Held, It is clearly implied in the mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated, and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things, the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist.

Decree affirmed,

Opinion by *Swayne, J.*

TAX. ALLOWANCE.

N. Y. COURT OF APPEALS.

Comins et al., *appls.* v. Board of Supervisors of Jefferson Co., *respts.*

Decided February 1, 1876.

An action will not lie to restrain the levying of a tax to pay railroad bonds which were illegally issued.

This court will not disturb allowance made by the court below when the latter does not exceed its jurisdiction.

This action was brought by certain taxpayers of that portion of the city of Watertown, which before the incorporation of the city formed part of the town of Watertown, on their own behalf and on behalf of all the other taxable inhabitants of the same part of the city, to restrain the defendants from levying a tax upon property in that part of the city for the purpose of paying any principal or interest upon certain bonds issued on behalf of the old town of Watertown, under chapter 75 of the laws of 1869, and chapter 52 of the laws of 1870, in aid of the construction of a railroad, and which they alleged were illegally issued.

L. J. Dornin, for *appls.*

G. Y. Comstock, for *respt.*

Held, That the action could not be maintained.

An order was made at Special Term granting defendants an extra allowance of \$700. It appeared that the action had been tried twice and involved great care and responsibility, and that the bonds in question amounted to \$300,000.

Held, That the Special Term did not exceed its jurisdiction in granting the allowance, and it was not the province of this court to consider whether it exercised its jurisdiction wisely or not.

Judgment of General Term, affirming judgment dismissing complaint and order for extra allowance, affirmed.

Per curiam opinion.

EQUITABLE RELIEF.

N. Y. COURT OF APPEALS.

The People, *appls.* v. Wasson, impleaded, &c., *respt.*

Decided February 8th, 1876.

An action by the people will not lie to set aside, or restrain the enforcement of an award made by the canal appraisers.

This action was brought to set aside on account of fraud and want of jurisdiction an award made by the canal appraisers in favor of V., defendant's assignee, and to restrain its enforcement. Plaintiff alleging that defendant had moved at Special Term for a peremptory *mandamus* to compel the auditor to pay said award, which was undetermined. It appeared that the award was made under chapter 520, laws of 1868, which conferred upon the appraisers authority to hear and determine the claim of V., and provided that either party could appeal to the Canal Board as in other cases. There was no allegation that such an appeal was prevented by fraud, collusion, accident or mistake.

E. W. Paige, for applt.

Eugene Burlingame, for respt.

Held, That as the Canal Board had ample power to grant plaintiffs all the relief they could obtain in this action (chap. 368, laws of 1829; chap. 201, laws of 1840; chap. 834, laws of 1866; and chap. 579, laws of 1868,) they should not have resorted to an independent action; that as to the motion for a *mandamus* by defendant, the auditor could have set up in his return to the writ, any defense legal or equitable the State had to the award, and as there are no allegations in the complaint and no proofs that plaintiff's rights could not be perfectly protected in those proceedings, they should not be enjoined by a suit in equity.

Judgment of General Term, reversing judgment for plaintiff upon report of referee, affirmed.

Per curiam opinion.

NEGLIGENCE.

N. Y. COURT OF APPEALS.

Burrows, respt., v. The Erie R. Co., appls.

Decided January 18, 1876.

It is negligence in a passenger to alight from a railway carriage while the train is in motion; and it makes no difference that the passenger had arrived at her destination and the train did not stop long enough for her to alight in safety.

This action was brought to recover damages for injuries received by plaintiff in getting off a train on defendant's road. It appeared that plaintiff, who was sixty years old, went out upon the platform of the car while the train was in motion, having read only a few minutes before the notice posted in the car by defendant, that "passengers must not get on or off the car while in motion." After she had gone out, the train being still in motion, one B., an acquaintance, who was not an employee of the defendant, got on the step of the car as it passed. Plaintiff requested him to assist her off, which he did by putting his arm around her, lifting her, and stepping backward, the train being all the time in motion. In doing this B. fell upon the planks on the track, and plaintiff fell with him and was injured. At the time she was encumbered with a satchel and a handbox. At the place there was no raised platform, but it was necessary to step down from the platform of the car upon planks laid on the track, level with the rails.

O. W. Chapman for applt.

A. More for respt.

Held, That plaintiff having acted upon her own responsibility, and at her own risk in leaving the car, and in direct violation of defendant's regulation, which was known to her, was guilty of negligence, and although the place where she got off was the station to which she was destined, and the train did not stop long enough for her to alight, the fault of defendant in omitting to stop long enough for plaintiff to alight in safety, did not justify her in imprudently exposing herself to danger by getting off while the

train was in motion. 56 N. Y., 302; 16 Gray, 501; 6 id., 64; Penn. R. R. Co. v. Kilgore, 32 Penn. St. 292; and Filer v. N. Y. C. R. R. Co., distinguished and explained.

Judgment and order of General Term, denying defendant's motion for a new trial, reversed, and new trial ordered.

Opinion by *Rapallo, J.*

GUARANTY. EVIDENCE.

U. S. SUPREME COURT.

Charles C. Smeltzer, *plff. in error*, v. Miles White, *def. in error*.

Decided January, 1876.

A guaranty that certain county warrants are "genuine and regularly issued," means that they are valid, legal claims against the county.

Such a guaranty covers the defect in the warrants of the want of a proper seal, without which they would be invalid.

Evidence that the warrants were issued for legal claims against the county, is inadmissible so long as the bonds were invalid for want of a seal.

To recover upon a guaranty it is not necessary to return, or offer to return, the property purchased upon its faith.

In error to the Circuit Court of the United States for the District of Iowa.

The suit was founded upon express guaranties of the genuineness and regularity of issue of county warrants; guaranties which the plaintiff alleged had been broken. He had sued the county to recover the amount of the warrants, and had been defeated, for the general reasons that the seal of the county had not been attached to the warrants, and that under the laws of Iowa, as held by the court, the warrants were invalid unless they bore the impress of the county seal. In the present suit against the guarantor, the circuit judge instructed the jury that the guarantees covered the defect of the

want of the county seal upon the warrants, and that inasmuch as they did not bear the seal, (the fact having been decided in the suit against the county,) the guaranty was broken and the defendant was liable.

The plaintiff was a resident of Maryland, the defendant of Iowa.

The claim now is that a guaranty that the warrants were "genuine and regularly issued," meant only that they were not forgeries, that they were not issued without consideration, and that they were ordered by the proper officers; that the plaintiff was bound to know, or must be presumed to have known, that the law required county warrants to be sealed with the county seal, and that, as the defect was apparent on the face of the instruments sold and guaranteed, the guaranties must be construed as not covering a patent defect; that the Circuit Court erred in holding defendant estopped by the judgments rendered in the plaintiff's suits against the county; that the court erred in overruling the defendant's offer to show that the warrants were regularly issued for legal claims against the county; that the court erred in refusing to charge, as requested, that there could be no recovery without a return of the warrants, and in charging as follows: "It is not necessary thus to recover, that the plaintiff should, before suit was brought, have tendered back the warrants mentioned in said written guaranties. It is enough that they are in court at the trial, and the court can order them to be retained, and on payment of the judgment rendered herein, to be delivered to the defendants.

Held, 1, That in construing a guaranty it is proper to look at all the surrounding circumstances; that plaintiff residing in Maryland, and purchasing Iowa warrants from a citizen of Iowa, he may be presumed to have required the guaranty for the very purpose of assuring himself that the warrants were valid and legal claims

against the county, which might be enforced by law.

2. That the absence of a seal was not a patent defect, equally within the knowledge of defendant and plaintiff; whether or not they required a seal depended upon the laws of Iowa, of which it may be presumed plaintiff had no actual knowledge, and it was for that reason he desired a guaranty, and that the guaranty covered the defect. Otherwise, the only guaranty which would protect him would be one co-extensive with the defenses to which such instruments were subject in suits against the county, founded upon a non-compliance with the state law on the part of the county officers.

3. That if the court charged that defendant was estopped by the judgments against plaintiff, such charge was harmless. The warrants were in evidence, and they exhibited the fact, not contradicted, that they were not sealed as the law required. They were, therefore, not genuine county warrants regularly issued, and it was the duty of the court so to declare them. The defendant's contract was broken as soon as it was made, and the plaintiff was entitled to a verdict, no matter whether the judgments in the suits against the county were conclusive or not.

4. That the court properly overruled defendant's offer to show that the warrants were regularly issued for legal claims against the county. The evidence proposed had no relevancy to the issue in the case. That the warrants were issued for debts due by the county was of no importance if they were not genuine, and in the form that the law required, to enable the holder to set them up as legitimate claims against the county.

5. That plaintiff was not bound to return the warrants before suit. He did not seek to rescind the sale, but relied upon an express warranty, in which case it is a universal rule that damages may be

recovered without a return or tender of the property.

Judgment affirmed.

Opinion by *Strong, J.*

COSTS.

N. Y. COURT OF APPEALS.

Chipman et al., v. Montgomery.

Decided February 1, 1876.

Where, by section 306 of the Code, the court has discretion as to costs, it may exercise that discretion at every stage of the action.

The rule governing costs of cross appeals, applied to a peculiar case.

This was a motion to correct a remittitur as to costs.

The action was brought for the construction of a will and for an adjudication upon the rights of the parties thereunder. The court below refused to construe the will or adjudicate upon the rights of the parties, and dismissed the complaint. Plaintiffs appealed from that portion of the judgment dismissing the complaint, and both parties appealed from that part refusing to construe the will and adjudicate upon the rights of the parties. The judgment below was affirmed by this court with costs.

J. W. Russell for motion.

E. C. James contra.

Held, That the questions involved in the cross appeals could only have been considered on the reversal of the principal judgment dismissing the complaint; that plaintiffs failing in that the other appeals were unimportant, and defendants were successful in the litigation, and plaintiffs were properly chargeable with costs; that this being an action wherein by Sec. 306 of the Code, costs are in the discretion of the court. The costs of all the appeals were in the discretion of this court; that that discretion exists and may be exercised in every stage of the action, and that the further provision that in certain specified cases the costs of an appeal shall

be in the discretion of the court, was intended to extend the discretion to cases in which, but for that provision, costs would have been recoverable by the prevailing party, under sections 304, 305.

Motion granted, and remittitur amended so as to give the defendants costs on the plaintiff's appeal from the judgment dismissing the complaint, and denying any other costs to either party as against the other upon the other appeals.

Per curiam opinion.

TAXATION OF COSTS.

N. Y. SUPREME COURT, GEN. TERM,
FIRST DEPT.

Audenreid, et al., *respts.*, v. Wilson, et al., *appls.*

Decided January 28, 1876.

Under a stipulation to allow judgment in accordance with the determination of another suit, with costs, the same as if a trial had been had, it is proper to allow such costs as were appropriate up to the time of the stipulation and trial for issue of fact.

Appeal from an order directing a re-taxation of costs.

This and another similar action, in which one Dovey and others were plaintiffs, were brought against these defendants, to set aside certain assignments as fraudulent. For convenience, it was stipulated that this suit be stayed, and wait the result of the Dovey suit, which result should be adopted as final in this and that "either party be at liberty to enter judgment, with costs, as the result of the Dovey suit will determine for plaintiffs or defendants, the same as if a trial had been had therein." No answer had been served in this suit, or any subsequent steps taken.

In the Dovey suit judgment was entered for defendant, the complaint being dismissed by default.

The defendant thereupon entered up judgment for costs for proceedings before

and after notice of trial, five term fees, an issue of fact and of law, and motion for receiver, on the ground that by the stipulation the same costs were to be allowed as in the Dovey suit.

A retaxation was ordered at Special Term, allowing only such costs as were appropriate to this suit at the stage which it had reached when the stipulation was entered.

F. C. Bowman for *respts.*

Hatch & Beneville for *appls.*

On appeal, *Held*, That the terms of the stipulation providing that costs are to be entered on the result of the Dovey suit, "the same as if a trial had been had therein," a fair interpretation would entitle the successful party to the costs that had accrued at the time it was made, and to the trial fee of an issue of fact, and nothing more.

Opinion by *Brady, J.*

VARIANCE. PERJURY. INCONSISTENCY.

N. Y. COURT OF APPEALS.

Harris, plff. in error v. The People, *defts. in error.*

Decided February 8, 1876.

The Fire Marshal of the City of New York has power to administer an oath upon an inquiry into the cause or circumstances of a fire, without first having a complaint under oath made before him.

On the trial of an indictment for perjury, which charged the prisoner with having sworn falsely that he had lost 60,000 cigars by fire, and the proof showed that he swore to having lost 65,000, the variance is immaterial, and it cannot be raised on appeal.

Inconsistency and repugnancy in a verdict.

The plaintiff in error was convicted of perjury committed before the Fire Marshal of the City of New York, who was investigating the cause, origin and circumstances of a fire, pursuant to chapter

563 of the laws of 1868, and the acts amendatory thereof, and supplementary thereto. It was claimed upon the trial, on behalf of the prisoner, that it did not appear that the Fire Marshal had power, or authority to administer an oath to him, as no evidence was given of a complaint under oath having been made. Section 1, chapter 332 of the laws of 1852, as amended by § 36, chapter 569, laws of 1857, authorized and required the General Superintendent of Police of New York City to investigate the origin of every fire occurring in said city, and invested him with the same powers, and jurisdiction as the police justices possessed. The police justices had jurisdiction upon complaint made to them, to subpoena and swear witnesses for the purpose of ascertaining whether any crime had been committed. The act of 1868 created the office of Metropolitan Fire Marshal, and made it his duty to examine into the cause, circumstances and origin of fires, and take the testimony on oath, and cause the same to be reduced to writing, and (§ 3) gave him power to issue subpoenas for witnesses, and to administer and verify oaths and affirmations to witnesses appearing before him, and that false swearing in any matter or proceedings before him, should be deemed perjury and should be punishable as such. By section 44 of chapter 338, laws of 1870, the Board of Police were given power to appoint a Fire Marshal, who was to have the same powers and duties conferred by chapter 563, laws of 1868. By § 4, chap. 584, laws of 1871, it was provided that all provisions of the act of 1868 should remain in force, and, for investigating fires and bringing to punishment parties guilty of arson, invested the Fire Marshal with the same powers and jurisdiction as were conferred upon the Superintendent of Police by the act of 1852, as amended by the act of 1857. The charter of 1873 gave the appointment of Fire Marshal to the Fire Commissioners, but conferred upon him

(§ 76) all the duties given and imposed by the previous statutes.

Ira Shafer, for plff. in error.

Benj. K. Phelps, for defts. in error.

Held, That no complaint was necessary to call into action the powers of the Fire Marshal, that he had all the authority conferred upon the Superintendents of Police by chap. 332, laws of 1852, as amended by chap. 569, laws of 1857, and he thus had authority to subpoena witnesses and swear them; that there was no repeal of chap. 563, laws of 1868, by the subsequent statutes. Plaintiff in error claimed that there was a fatal variance between the indictment and the proof, in that the indictment alleged that the prisoner swore before the marshal, among other items, that there were 60,000 cigars in the building at the time of the fire, while the proof showed that he swore that there were 65,000 therein. The point was not raised upon the trial.

Held, That the point could not be raised there; as, if it had been raised the testimony might have been excluded, or the jury directed to disregard it, and the proof of false swearing as to the other items would sustain the verdict but, that if properly raised this variance was not material and could be disregarded; that the perjury was not so much in swearing to the precise number destroyed, but in swearing to a much larger number than he had lost. 5 Wend., 271. When an indictment charges that the prisoner has stolen a number of articles, or inflicted a number of blows, or has obtained goods by a number of false pretences, or has sworn falsely in an affidavit as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offence charged. 3 Russ on Cr. 4th Lond. Ed. 105; 2 Ld., Ray 886; 4 C. H., Rec. 125; Ros. Cr. Ev. 6th Am. ed., 763. There were two counts in the indictment, the first charging perjury in the oral testimony given before the Fire Marshal, and the second charging

perjury in swearing to an affidavit before the same officer, containing in substance the same matter testified to orally. The jury found the prisoner guilty under the second count only. It appeared that the marshal was not present when all the oral evidence was given.

Held, That the jury may have found that as to the oral evidence the false swearing charged did not take place before the marshal, and hence that the prisoner was not guilty as to that; that there is no repugnancy or inconsistency in the verdict.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Earl, J.*

JURISDICTION. EJECTMENT. CONNECTICUT SUPREME COURT OF ERRORS.

Sullivan v. Vail.

Decided February Term, 1875.

In ejectment, the value of the land is immaterial.

A court will not be deprived of jurisdiction unless it appears affirmatively in the declaration that the "matter in demand" is beyond its jurisdiction.

Ejectment: brought to the Court of Common Pleas of Hartford County. The writ claimed \$300 damages. The following facts were found by a committee:

The plaintiff has been the owner in fee and in possession of the demanded premises from the 17th day of June, 1956, until the present time, except that portion of the same of which he has been disseized by the defendant. On the trial the plaintiff testified that the demanded premises were worth the sum of \$4,000, without including the house, whereupon the defendant objected to the admission of any further testimony on the part of the plaintiff, on the ground that the court had no jurisdiction of the case, and all

such testimony was thereafter received subject to objection.

The plaintiff claimed to recover the possession of only a strip of land, part of the demanded premises, one inch wide in front on Windsor street, and four inches wide in the rear, running back forty-four feet. Of this strip the defendant had disseized the plaintiff. The report of the committee described this strip, and found that it was worth at the rate of \$100 per foot on Windsor street, and that the value of the whole of the demanded premises was between \$3,000 and \$4,000, and that the plaintiff had suffered damage by the disseizing the sum of five dollars.

The report being accepted by the court the defendant moved that the cause be erased from the docket on the ground that the court had no jurisdiction.

The second section of the act of 1869, (Acts of 1869, p. 313), which created the Court of Common Pleas, provides that it should have "exclusive original jurisdiction over all civil causes which shall be brought before it according to law, and in which the debt, damages, or matter in demand, exceeds the jurisdiction of a justice of the peace, and does not exceed the sum of \$500."

The revision of 1875, p. 413, sec. 2, provides that "all causes at law, wherein the matter in demand exceeds \$100, but does not exceed \$500, in amount or value, shall be brought to the Court of Common Pleas," &c.

Held, The "matter in demand" is determined by the demand in the declaration, unless the declaration, on its face, fails to support the demand.

The declaration contains no allegation as to the value of the land, or the value of the plaintiff's right to the possession of the same; certainly no mere presumption of value, for the purpose of ousting the court of its jurisdiction can, or ought to be made.

We doubt whether the value of the land is necessarily a part of the matter in de

mand, for the purpose of determining the question of jurisdiction in an action of disseizin. The value of the land sued for is no necessary part of the case. Any evidence regarding it is unnecessary, and superfluous, unless it is made material, and put in issue, by a plea to the jurisdiction.

Judgment affirmed.

Opinion by *Foster, J.*

LABOR AND SERVICES.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPT.

Sullivan, *respt.*, v. Sullivan, *applt.*

Decided January, 1876.

To entitle a daughter to recover of her father, for wages for her labor and services, the contract to pay her must be clearly proved.

The plaintiff in this action is the daughter of defendant, and they had lived together and kept house, plaintiff acting as housekeeper for many years. They had lived in N. Y., and had generally lived alone. Defendant paid all plaintiff's expenses, and supported her all the time she lived with him. Plaintiff brings this action for her wages, &c.

Johnson & Hoyt for plff.

Ruger & Jenny for deft.

Held, That plaintiff should have been non-suited. The evidence of the plaintiff clearly shows that the relation of master and servant never existed between plaintiff and defendant.

The relation the parties bore to each other, was clearly that of parent and child.

That where members of a family live together, the law will not imply a promise to pay for board on the one side, nor wages on the other.

An express, distinct, and well understood bargain should be proved before any such claim should be allowed. *Robinson v. Cushman*, 2 Den. 152; *Williams v. Hatilimen*, 3 Coms., 312.

Judgment reversed, and a new trial ordered.

Opinion by *Smith, J.*; *Mullin, P. J.*, and *Gilbert, J.*, concurring.

ATTORNEY. SERVICES.

SUPREME COURT OF MISSOURI.

Southgate v. Atlantic and Pacific Railroad Company.

Decided October Term, 1875.

The power of the officers of a corporation to employ counsel is implied, and need not be proved. Such officers have power to engage attorneys without receiving any express delegation thereof.

To prove the value of certain services, the evidence should show what those particular services are reasonably worth, not what is the value of services generally.

The plaintiff, an attorney, brought this action to recover the reasonable value of certain professional services, alleged to have been rendered defendant.

The first count in the petition claimed fifteen hundred dollars for services performed, and for counsel and services as an attorney-at-law, rendered at defendant's request.

The answer was a denial of all the allegations contained in the petition. The bill of particulars accompanying the first count referred to certain specific cases attended to, and stated a demand for counsel and services as an attorney generally from March 15th, to October 15th, 1867. The plaintiff gave testimony in his own behalf, and stated that the services were performed, and that he was employed by the superintendent of the road, and that he at different times corresponded with the various officers and managers of the road, and that they recognized him as an attorney and acquiesced in his employment.

He also proved by a witness, against the objection of the defendant, that the services of a good attorney at the place

where plaintiff was, would be reasonably worth two hundred dollars per month.

There was a verdict and judgment for plaintiff.

It is insisted by the defendant that before the plaintiff could recover, it was necessary for him to show that the officers who employed him had authority from the corporation to make the employment.

Held, 1. The rule is that not only the appointment, but the authority of the agent of a corporation may be implied from the adoption or recognition of his acts by the corporation.

Managing officers of corporations have power to employ attorneys and counselors, without express delegations of power, or formal resolutions to that effect.

2. The evidence of the witness as to the value of the services was improper. He testified that the services of a good attorney would be reasonably worth \$200 per month; his attention should have been called to the services rendered, and his opinion asked as to what they were reasonably worth.

Judgment reversed.

Opinion by *Wagner, J.*

NEGLIGENCE.

N. Y. COURT OF APPEALS.

Fallon by Guardian, &c., resp., v. Central Park N. & E. R. R. Co., Applt.

Decided January 18, 1876.

Contributory negligence cannot be charged against a child of tender years, where its parents exercise such care in respect to it as persons of ordinary prudence would exercise under the circumstances, and where it exercises such care as might reasonably be expected from one of its age.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of defendant. It appeared upon the trial, that at

the time the injuries were received plaintiff was five years and three months old, and resided with his mother in a tenement house, on the first floor, in rooms leading into the back yard, and also into the street, down some stairs. Plaintiff had been playing with other children in the back yard, and came in for a drink of milk; the mother gave it to him, and he sat at the table to drink it, when the mother passed into the bed-room adjoining, leaving the door open, and telling plaintiff to go back into the yard, and in five minutes notice was brought her that the child had been injured. The mother testified that the child had never before been in the street. The evidence tended to show that the child passed out into the street, and in attempting to cross defendant's track was struck by one of the horses; that the car was being driven at an unusual rate of speed, and that the driver was engaged in conversation with persons standing on the platform, and was not looking at or giving any attention to his horses or persons crossing the street. The court charged the jury that if the mother omitted to exercise such care in respect to the child as persons of ordinary prudence would exercise under the circumstances, or if the child omitted to exercise such care as might be reasonably expected from one of his age, the verdict should be for the defendant. The jury brought in a verdict for the plaintiff.

Edward McCarthy for resp.

A. J. Vanderpoel for applt.

Held, No error; that the jury were justified in holding that plaintiff's mother under the circumstances had no reason to suspect, that he would go into the street, but had a right to presume the child would obey her direction and go into the back yard, and that she used ordinary care, (38 N. Y., 455,) that the charge of the judge upon the question of the negligence of plaintiff and his mother was correct; that although a child five years old cannot be regarded as *sui juris*, it possesses in some

degree reason and judgment, capable of understanding what was said, and may be made subject to the will, and direction of those having it in charge, and a mother may be assumed from natural love and affection, to be vigilant in protecting it from harm.

Judgment of General Term, denying a new trial, affirmed.

Opinion by *Church, C. J.*

OFFICER APPOINTMENT.

N. Y. SUPREME COURT—GEN'L TERM
FOURTH DEPT.

Burditt, applt. v. Barry, respit.

Decided January, 1876.

The presumption is that a public officer performs his duty.

This presumption may be overcome by evidence.

Appointment of a collector of a school district by parol not good.

An officer to justify his acts must be an officer de jure.

This action was originally brought before a Justice of the Peace, and was for a wrongful conversion of personal property.

Defendant justified as collector of a school district, and by virtue of a tax list and warrant. He was appointed by the trustee of the said school district as such collector by parol. His appointment was not in writing, or signed by the trustee, or filed in the clerk's office, as required by law. Defendant had acted as such collector for some time prior to this alleged conversion.

There was judgment before the justice for plaintiff; there was judgment in the County Court for defendant, and from such judgment plaintiff appeals.

F. Brundage, for respit.

James F. Fitts, for applt.

Held, That the legal presumption which exists in favor of the due performance of duty by a public officer, *prima facie*, established the validity of his ap-

pointment; so, also, proof that defendant was in actual exercise of the duties of the office of collector was *prima facie* evidence of his official character, and dispensed with the necessity of showing his appointment. But the effect of this evidence was overcome by the proof on cross-examination of the trustee, that he did not make or sign any written appointment for defendant, and did not file any in the proper clerk's office, as required by law.

That defendant was not an officer *de jure*; that his acts as an officer *de facto* may be valid, so far as the public and third persons are concerned, but when the officer himself does an act for which he is sued, he can establish his justification only on proof that he is an officer *de jure*.

The judgment must be reversed.

Opinion by *Gilbert, J.; Mullin, P. J.*, and *Smith, J.*, concurring.

CONDITIONAL SALE.

N. Y. SUPREME COURT—GEN'L TERM.
FOURTH DEPT.

Macaulay, applt. v. Porter, respit.

Decided January, 1876.

When the parties to a sale of real estate stipulate at the time of sale, that on a resale, the grantor is to have a portion of the profits, such stipulation is legal, but the grantor has no right to insist on a sale, after the stipulated time. Such a transaction is not a mortgage.

This was an action to have a deed declared a mortgage, &c., &c. Plaintiff sold certain premises to defendant by a deed absolute on its face. At the time of the sale defendant gave back to plaintiff a writing, in and by which it was provided that the property might be sold within one year for not less than \$4,000, being an advance of \$1,500 over the price paid by the defendant, and that in case of such sale as above, the profits arising upon such sale should be divided between the defendant and his grantor, &c. It was also

provided that if this property should not be sold within one year, all interest in the grantor should close, &c. The evidence, on the trial, did not show that the deed was given for or intended to be a mortgage.

Held, That nothing short of evidence which shows the existence of the relation of debtor and creditor between the parties to an absolute conveyance, and that it was in substance a security for a debt, will turn it into a mortgage. That a conveyance, coupled by a stipulation by the grantee that the grantor may have the right to buy back the property within a certain time, or to participate in the proceeds of a sale thereof is not forbidden by law, and where such a contract is made, the parties must abide by it; but such grantor has no right to insist on a resale after the stipulated time, nor is such a transaction a mortgage or any thing else than what it purports to be, viz: a sale with the privilege reserved to the seller of repurchasing the property sold, or of showing the profits which may accrue from another sale.

That there is a recognized distinction by the courts between an absolute conveyance intended to be a mortgage merely, and a conditional sale or a sale with the reservation of the privilege mentioned. *Hill v. Grant*, 46 N. Y., 496, and 55 N. Y., 637.

That the paper given by the grantee, and accompanying the conveyance does not in terms qualify the latter.

That the evidence shows that a mortgage was not intended, and the paper itself is quite incompatible with the idea that any estate or interest in the lands remained in the grantor.

Judgment affirmed.

Opinion by *Gilbert, J.*

EMBEZZLEMENT.

N. Y. SUPREME COURT, GENERAL TERM
—FIRST DEPARTMENT.

In the matter of John L. Swan.

Decided March 7, 1876.

Facts sufficient to establish embezzlement.

A declaration in the recognizance by which the prisoner is released on his own signature, that he elects to be tried by the Court of Special Sessions, no subsequent demand for trial by jury being made, is a waiver of the right of trial by jury.

The court may correct an erroneous sentence any time during the term and before the Sheriff has proceeded to execute sentence.

Certiorari to the Court of Special Sessions to review a conviction for embezzlement.

It appeared from the evidence, on the trial, that the relator had been in the employment of the complainant, Dorlan, for some years. The latter had reason to believe that some one in his employment was embezzling his money, and he asked one of his debtors, a Mr. Sutton, to set aside for the payment of his bill certain bank notes which, by his mark, could be identified. They were so marked by Mr. Sutton in the presence of Dorlan. An employee of Dorlan's, named Conklin, was sent to collect the bill. It was his habit to make returns to Swan, who had charge of the money. He collected the amount of the bill and divided it with Swan, in pursuance of a proposition made by the latter that he should do so. Conklin was acting under the instructions of his employer, and who, in doing what he did, was aiding in the development of Swan's dishonesty. Swan kept the money, and when charged with the conversion denied it. The bills marked by Sutton and received by Swan, were found on the latter when arrested.

It was claimed by the relator the conviction was erroneous, for the following reasons, viz:

1. That the Court of Special Sessions had no jurisdiction to try the prisoner, a trial by jury not having been waived.

2. That the evidence was not sufficient to establish proof of the crime.

3. That the prisoner was twice sentenced.

James Orton, for the relator.

B. K. Phelps, for the people.

Held, That the evidence was sufficient to establish the crime, as the arrangement between Conklin and Swan was sufficient to establish the intent upon the part of the relator to convert the money to his own use, and the possession of the money of his employer was found on the person of the relator.

That a trial by jury was waived by the prisoner; that prisoner declared in his recognizance by which he was set at liberty, signed by himself and his surety, that he elected to be tried by the Court of Special Sessions, and he at no time subsequent withdrew his election, then made, and demanded a trial by jury. The Court of Special Sessions had jurisdiction to try the prisoner. The alleged error in the sentence is unavailing.

In pronouncing it the court imposed at first a fine of \$250, but it was immediately and before the prisoner left the Court corrected, and the fine of \$100 imposed, which was the maximum allowed by the statute. The relator was recalled for the purpose. The right of the Court then and there to correct the sentence inadvertently pronounced cannot be questioned successfully. The power thus exercised may be employed, it seems, at any time during the term and before the sheriff has proceeded to execute the sentence. *Miller v. Finkle*, 1 Parker Cr. Rep. 37.

Judgment affirmed.

Opinion by *Brady J.*; *Davis, P. J.*, and *Daniels J.*, concurring.

COMPOUND INTEREST.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Young, applt., v. Hill, respt.

Decided January, 1876.

Compound interest is only recoverable on a special agreement to pay such interest upon interest after the latter has become due.

A final account made by a party, in which he includes interest on interest on his own bond, is such a special agreement as binds him to pay compound interest.

One F. was for many years agent for one P. who resided in England. In 1817 F. gave his bond to P. for \$6,000 at six per cent interest, and from about the time he gave it, he held the same in his possession, with other property of P.'s, and annually sent his account to P. In all these accounts, he charged himself with interest on interest on such \$6,000. In 1871 such bond amounted to nearly \$40,000, and plaintiff in the same year died, and before his death, by himself, he made and sent an account to P., and in it stated:

"The foregoing accounts and amounts have been settled and liquidated, and the balance due to the Rev. R. F. F. Pultney is \$70,000, subject to correction for errors and omissions, &c."

In this account the amount of the bond at about \$40,000 was included.

This action was brought for an accounting, and on the trial this item, so far as it included any compound interest, was struck out.

Wm. Rumsey for applt.

Brown & Holden for respt.

Held, That compound interest is not recoverable except upon a special agreement to pay interest upon interest. *Fall v. Hilton*, 11 Paige, 228.

That such agreement can be implied from an account stated, and need not be expressly proved in writing, separately

from such account stated; that the account in this case has other and greater force than that of a mere account stated, or of the mere admission of its correctness; that upon its face the statement in such account is evidence of an express agreement by Mr. F. to pay interest on interest. It is a settled and liquidated account, and made by the debtor himself, and expressly asserts upon its face that it is settled and liquidated. It is, in legal effect, an agreement, or involves an agreement, to pay such balance, as much as if he had written in the shape of a peremptory note to P. that the amount so specified was due to him. It is in the nature of a new agreement to pay the compound interest embraced in such stated balance. *Holmes v. DeCamp*, 1 John. 34; *Ex parte Bevan*, 9 Vesey, 224.

The judgment should be corrected by inserting in it the amount struck out of the account for compound interest, and as thus corrected, affirmed.

Opinion by *Smith J.*

EVIDENCE. BOOKS OF ACCOUNT.

N. Y. SUPREME COURT, GEN. TERM.,
FIRST DEPT.

Knight, respt., v. *Cummington*, et al.,
Adm'rs, appls.

Decided December 6, 1875.

Diary of physician cannot be offered in evidence without conforming to the rule relative to books of account.

Appeal from judgment entered on report of referee.

This action is brought by plaintiff to recover for services rendered as a physician to defendants' intestate.

On the hearing before the referee, plaintiff offered his physicians' diary to prove the number of visits which he had made to defendants' intestate.

No proof was given that the plaintiff had no clerk, that the book was correctly kept, and that others had settled by it, and had found it accurate.

It was admitted in evidence, plaintiff claiming that the diary of a physician did not come within the intent of the rule laid down in *Vosburg v. Thayer*, 12 Johns. 461.

E. C. Ripley for respt.

Amos G. Hull for applt.

On appeal. *Held*, That the question presented is, whether physicians possess any greater privileges as to the admission of books, than merchants or traders.

The value of original entries as evidence, rests upon the doctrine of necessity, which is no more pressing in the case of a physician, than of other persons who keep no clerk, and have to rely upon the honesty of their books, after proper preliminary proof has made them evidence.

No reason presents itself for exceptions in favor of physicians; the rule is broad enough now, and our courts show no approved intent to enlarge its application.

Plaintiff did not make this book competent evidence by the necessary preliminary proof. The book was therefore improperly received in evidence.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

HIGHWAYS. INJURIES. DAMAGES.

N. Y. SUPREME COURT—GENERAL TERM
FOURTH DEPT.

Beck v. Carlton, et al.

Decided January, 1876.

A person digging a pit or ditch near or in a highway, must see that travelers are protected from falling into it. The same rule is applicable to an alley in a city, although the ditch or pit is not in the exact bounds of a street, alley, or lane.

In the village of Bath, in this State, was an alley or lane. It was laid out by the owners of the land along its line more than 20 years prior to the accident in

question. The alley was never recorded as a public street or highway. It has always been used, since it was opened, by teams and foot passengers, at pleasure.

This alley varied in width along its length, and at the place of the accident was about thirty feet wide.

Plaintiff was constructing some buildings, and the back of such buildings were on the alley, and at the rear of them were some openings, about eight feet deep, and it was claimed that these openings did not extend into the alley.

At about 8 P. M., plaintiff was passing along this alley; it was quite dark, and raining, and the middle of the street very muddy; the alley was somewhat obstructed by building materials, and plaintiff, in keeping along near the rear of these stores, and in attempting to turn out for a team, fell into one of these openings, and was injured, and brings this action for the injury.

The openings were uncovered, and there were no fences or boundaries to indicate the limits of the street.

The judge on the trial charged the jury "that it was not material whether the opening into which the plaintiff fell was within the bounds of the street or within the bounds of defendant's lot, except so far as it bore on the question of defendant's negligence in leaving the area open. He also charged that a person passing through an alley of that width, cannot be required, and is not expected to know where the lines are. If he exercises ordinary prudence and care to keep within the bounds marked by ostensible boundaries, that is all that can be required of him. He may take the ostensible boundaries and the indications where those boundaries are."

He also charged "that plaintiff was not bound to know where the legal boundary lines of the alley were; that a person is liable for an accident caused by an excavation upon his own land, so situated that a person using the highway, and using ordinary caution, falls into the excavation,

provided the excavation is so near the highway that a person lawfully using it, and using ordinary caution, falls into it, and it makes no difference that the excavation is 7 to 9 feet from the originally established bounds of the highway."

There was a judgment for the plaintiff.

Defendant moved for a new trial at Special Term, and such motion was granted, and from such order plaintiff appeals to this court.

Held, That the principle laid down by the judge at the Circuit, was correct; that where the bounds of a road or alley are clearly defined by fences or other boundaries, a person passing along such road or alley is bound to keep within the defined bounds, and for any accident happening to a person outside such bounds, the person owning the land on which any ditch or excavation is made, causing such injury, is not liable; but where the bounds are not clearly defined, and any excavation, &c., is made not directly in the highway, but near to it and so near that a person might, in passing along such road fall into it, the party making the ditch, &c., is liable to any party injured.

How far from the margin of the street or alley the adjoining owner may make an excavation without being liable, must be determined in each case, and the jury must determine in each case the question of liability, having regard to the knowledge the traveler has of the highway, its width, use, and especially the route and the care and caution exercised by the traveler.

Order reversed.

Opinion by *Mullen, P. J.*

DAMAGES. CONTRACT OF SERVICE.

SUPREME COURT OF ILLINOIS.

Frederick N. Hamlin v. Albert S. Race.

Decided January 21, 1876.

When an employee under a contract for payment of money by installments for a term of service is discharged without cause, he can only recover

for the amount that would have been due, had he continued in service, at the time the suit was instituted. If, when discharged, he rescinds the contract, and then sues for its breach, it may be that he can recover for all the damages he sustained during the term by the breach, if the trial was had after the expiration of the term.

Appellee was employed on the first of January, 1873, by Hamlin, Hale & Co., as a salesman in their store for one year, at a salary of \$1,020, in monthly installments of \$85. They, on the 23d of June following, dismissed him from their service, when they offered to pay him the amount that was due him to that date, which he declined to receive, and on the 6th of the following August brought this suit, to recover the balance for the full year, and on a trial in the court below recovered the full amount.

The declaration was in assumpsit, and contains a special count, with usual common counts. The plea of the general issue was filed.

Held, 1. That no rule was better established or more inflexible than that a plaintiff cannot recover for money not due at the institution of the suit; that a party cannot do indirectly what he cannot do directly, and that therefore the plaintiff could not recover any more than what was actually due when his action was commenced; to permit a recovery for sums falling due after suit would be an evasion of the rule.

2. Had appellee when discharged, terminated the agreement, and then sued on the breach of the contract, it may be that a different rule might have prevailed. Then the cause of action would have been the breach, and it would have been averred that the contract was at an end, and that plaintiff had been thrown out of employment, whereby he had sustained damage, etc. In such a case it may be that he could have recovered for all the damage he sustained during the year by the breach of the contract, if the trial

was had after its expiration. In such a case the damage would have continued, had he been unable to procure employment during the time.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Opinion by Walker, J.

MANDAMUS.

N. Y. SUPREME COURT, GENERAL TERM— FIRST DEPARTMENT.

The People, ex rel. George W. Carleton, *respt.*, v. The Board of Assessors of the City of New York, *appls.*

Decided March 7, 1876.

A peremptory writ of mandamus, under Chap. 697, Laws of 1867, to compel Board of Assessors of N. Y. City to assess damage to property, caused by closing street, is proper upon their refusal to act.

Denial of knowledge or information sufficient to form a belief, in answering affidavit, is insufficient to put in issue positive allegations in the affidavit of applicant for writ.

A presumptive right to the writ is all that is necessary to be shown to secure success of applicant in such case.

Appeal from an order directing the issuing of a writ of peremptory mandamus.

The writ commanded the defendants and appellants to meet as a Board of Assessors of the City of New York, and to estimate the damages done the premises of lands of the relator, George W. Carleton, by reason of the closing of the Bloomingdale road, between 82d and 103d Streets, in the City of New York, by the Commissioners of the Central Park, under and pursuant to Chapter 697 of the laws of 1867, &c.

The act aforesaid empowered the commissioners aforesaid to lay out and close streets, avenues, roads, public squares or places, within a particularly designated and described district of the City of New York, adjacent to, and surrounding the Park. This district included territory

forming part of what was called Bloomingdale Road, upon which the applicant claimed that he owned property which was injured by the action of the Commissioners in closing that road.

In the affidavit employed by the relator in his application for the writ, he swore positively to his title to the property; that the Bloomingdale Road, so far as it affected the applicant's premises, was closed by the Central Park Commissioners, and that the closing of the road had depreciated the value of the relator's premises.

It appeared in such affidavit, also, that the Bloomingdale Road was a public road laid out on the official maps of the City of New York.

The answering affidavit alleged merely that the deponent, one of the assessors, had no knowledge or information sufficient to form a belief as to the truth of the foregoing allegations.

The act of 1867 provides that damages shall be awarded to persons whose property may be injured by the Commissioners action under it, in closing streets, avenues and roads, Laws 1857, 1750; and that such damages shall be ascertained and paid in the manner specified by laws of 1852, 47, Secs. 3, 4.

Jas. A. Deering for resp't.

J. A. Beal for appl't.

Held, That the statement in the answering affidavit of defendants and appellants, that they had no knowledge or information sufficient to form a belief as to the truth of the various positive allegations in the relator's affidavit, cannot be said to weaken the force of such positive averments, or put the facts alleged to issue.

That the recognition of the road by the various acts of the Legislature, was sufficient, accompanied with the allegations that said Bloomingdale Road was a public road laid out in the City of New York.

That it was not necessary, to entitle the applicant to a hearing, that it should be conclusively shown in the first instance,

that an award must be made in his favor by the Board of Assessors.

A presumptive case was enough to secure the success of his application for the writ. Relator was entitled to have the claim made by him heard by the Board when it was applied for.

Order made should be affirmed with \$10 costs, besides disbursements.

STOCKHOLDER. CORPORATION.

N. Y. COURT OF APPEALS.

The Cayuga Lake R. R. Co., *resp't.* v. Kyle, *appl't.*

Decided February 8th, 1876.

It is no defense to an action to recover an unpaid subscription, that there was a defect in the organization of the company, where there is a de facto corporation from which defendant may receive his stock.

This action was brought to recover from defendant a balance remaining unpaid upon a subscription made by him for ten shares of the capital stock of plaintiff. It appeared that defendant signed the original articles of association in which the proposed railroad was described as intended to be constructed from the N. Y. C. R. R. to Ithaca, the length of said railroad to be thirty-seven miles. The articles were duly acknowledged and filed, and the company was, in fact, organized under them, officers elected and the railroad constructed and put in operation, and calls were made upon the subscribers for payment of their subscriptions, and the corporate existence of the company was recognized by chapter 314, laws of 1869. Defendant claimed that the articles of association were defective in not definitely stating the termini of the road, or the counties through which it passed, as provided by chapter 140, laws of 1850.

Cox & Avery, for resp't.

W. E. Hughitt, for appl't.

Held, That the failure to comply literally with the provisions of the statute as to the description of the location of the

property, would not prevent a recovery; that defendant was entitled to the shares for which he subscribed; that by the acts of his associates in going on, locating and constructing the road, and by the legislative recognition of its corporate existence, these shares became shares in a corporation *de facto*, notwithstanding the defect in the original articles; that defendant had received all he had contracted for and should not be relieved from paying for his shares. 26 N. Y., 25.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Rapallo, J.*

DIVORCE.

SUPREME COURT OF PENNSYLVANIA.

Gilbert T. Harris, *applt.*, v. Elizabeth Harris, *respt.*

Decided Feb. 7, 1876.

Obstinate silence, laziness, or wilful neglect of household duties on the part of a wife, do not constitute cruel and barbarous treatment as a ground for divorce within the meaning of the act of May 8, 1854.

Appeal from Common Pleas of Philadelphia county.

Libel in divorce, *a vinculo matrimonii*, filed by Gilbert T. Harris against his wife, Elizabeth Harris, on the ground that respondent had "offered such indignities to the person of libellant as to render his condition intolerable and his life burdensome, and thereby forced him to withdraw from his house and family." The cause came before the court below, on the report of an examiner. The testimony was to the effect that the witnesses believed that libellant could not live with respondent without endangering his health and life, on account of respondent's bad temper and intolerable treatment, but the only specific act of cruelty or bad treatment testified to, was the refusal of respondent to speak to libellant for several days, and sometimes for weeks, without any cause.

The court below refused to grant the divorce. Libellant appealed.

There is nothing in the evidence in this case to bring the conduct of Mrs. Harris toward her husband within the act of 1854, as a ground of divorce, that is to say, when a wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable, or his life burdensome.

No such cruel and barbarous treatment was shown in this case. If by other means a wife makes her husband's life burdensome or intolerable, as by obstinate silence, laziness, or wilful neglect of household duties, they do not fall within the meaning of the act of 1854.

Decree affirmed, with costs, and appeal dismissed.

Per curiam opinion.

DEFAULT. PRACTICE. LACHES

PHILADELPHIA COMMON PLEAS.

Phipps v. Cresson.

Decided February 19, 1876.

When more than three years have elapsed since the commencement of a suit, judgment by default will not be granted without notice to defendant.

In this case an action of assumpsit was brought to December Term, 1872, in the late District Court. The writ had been returned "served," and a copy of the claim had been duly filed, but no appearance had been entered and no affidavit of defense filed.

Motion for judgment for want of an appearance and affidavit of defense.

Held, We will not give judgment upon a mere motion on so stale a claim, as, the plaintiff having slept on his rights, the defendant might well suppose he had waived them. To give judgment now, without notice, would be in the nature of a snap judgment. The proper course is to take a rule to show cause.

Motion denied.

NEW YORK WEEKLY DIGEST.

Vol. 3.] MONDAY MARCH 20, 1876. [No. 6.]

JUDGMENT. FOREIGN ATTACHMENT. JURISDICTION.

SUPREME COURT OF PENNSYLVANIA.

Noble et al. v. The Thompson Oil Co. to the use, &c.

Decided January 6, 1876.

An assignment of a judgment of a Court of the State of Pennsylvania between parties resident, for value, is not merely a statutory transfer of it, but a sale, valid everywhere; and after such assignment, the assignor has no attachable interest in it.

That a foreign attachment issued out of a Court of another State, and the garnishee under its judgment has actually paid the money to an attaching creditor, does not discharge the garnishee, if it appear that the Court has no jurisdiction over the subject matter, and that the garnishee might, under the law of such State, have protected himself, but neglected to do so. In such a case article 4, section 1, of the Federal Constitution, providing that full faith and credit shall be given in each State to the judicial proceedings of every other State, is not applicable.

Error to the Common Pleas of Erie Co.

The Thompson Oil Company on September 25, 1867, obtained a judgment for \$26,233.50 against Snow, Burgess, Wright and Wood in the Common Pleas of Erie County. The defendants thereupon filed a recognizance of bail in error, in which Noble, Lamb, Snow and others were sureties, and took a writ of error to the Supreme Court.

From the pleadings the following facts appeared: On November 27, 1867, the Thompson Oil Company assigned to Conrad Brown (then living, but since deceased), \$23,273.50 of the judgment for his own use, and the remaining \$3,000 thereof, by a separate instrument, to Walker and others.

On January 25, 1868, a New York Corporation, called the Woods & Wright Oil Creek Company, filed a petition in the Su-

preme Court of New York, setting forth that they were creditors of the Thompson Oil Company to a large amount, and attached the debt due by Snow, Burgess, Wood and Wright to the latter company. The defendants had been brought into the Supreme Court of New York by a writ served upon one of them in 1866 while passing through that State. On November 18, 1868, the judgment obtained by the Thompson Oil Company was affirmed by the Supreme Court of Pennsylvania, whereupon Messrs Brown, Walker and others commenced an action of debt on the recognizance of bail, suing in the name of the Thompson Oil Company to the use of Brown, Walker et al. against Noble, Lamb and the other principals and sureties upon the bail bond, to recover the amount of the judgment.

The Thompson Oil Company and the equitable plaintiffs were all citizens and residents of Pennsylvania.

The narr. alleged that upon November 27, 1867, the judgment had been assigned to the equitable plaintiffs, a part to Brown for a subsisting indebtedness, and the balance to the others (in the proportions hereinbefore mentioned) for professional services.

The defendants pleaded substantially as follows: That before the commencement of the present suit, to-wit, on January 25, 1868, the "Woods & Wright Oil Creek Company, a corporation of the State of New York, claiming to be creditors of the Thompson Oil Company, caused to be issued from the Supreme Court of New York a writ of foreign attachment, having first duly given security, &c., and that the attachment was duly served upon the present defendants, then residents of New York, whereby the debt they owed the Thompson Oil Company was duly attached by the laws and practice of New York, for the benefit of the attaching creditors; that process was duly served upon the Thompson Oil Company by the laws and practice aforesaid, by advertise-

ment, and by sending a copy of the writ by mail to the office of the Company at Erie, Pa., and that defendants gave further notice of the attachment by serving a notice personally upon the president at Erie upon February 1, 1868; that the attachment suit was proceeded with and upon September 24, 1868, judgment was obtained against the Thompson Oil Company in the sum of \$56,000, and thereby the plaintiffs acquired a lien upon the claim of the Thompson Oil Company as of the date of the service of the attachment (viz January 25, 1868), and upon October 13, 1868, levied execution upon its debt; that when the defendants gave notice to the Thompson Oil Company of the attachment, they had no notice of the assignment of the debt in the present suit, but soon afterwards, viz. upon February 23, 1868, received notice thereof, and gave notice to the assignees (the equitable plaintiffs) to use their name in any application to the Supreme Court of New York, or any other Court, for the purpose of protecting their debt, &c., and the defendants did refuse to pay the judgment in the attachment suit, alleging that it had been assigned as set forth in the narr. Whereupon the Supreme Court, in accordance with the law of New York, did upon December 18, 1868, appoint a receiver of the amount of the alleged indebtedness of defendants to the Thompson Oil Company.

Further, that upon the receiver giving security, proceedings were instituted to determine the question whether the garnishees were entitled to protection against the payment of the said indebtedness to the receiver for the Woods & Wright Company, by reason of the alleged assignment of the judgment to the present equitable plaintiffs; which question was, in accordance with the practice of the New York Court, referred to a referee, who reported in favor of the defendants as to the fact of the assignment, but against them on matter of law, upon the

ground that the assignment, although prior in time to the attachment, was no bar thereto; this report was confirmed by the Court, who thereupon gave judgment against the defendants in the sum of \$30,344.11, including interest and costs, and notice of this judgment was given to the equitable plaintiffs: That no exceptions to this report were filed by the equitable plaintiffs, nor appeal nor writ of error taken, wherefore the defendants did afterwards pay the amount of the judgment, and thereby satisfied the claim in the present suit. Conclusion that the defendants were ready to verify by the said record and prayed judgment, &c.

The plaintiffs moved for oyer of the record of the suit in New York, which motion the Court below granted. The record was then produced in full, without any objection (of record) by the defendants. This record contained, *inter alia*, the warrant (or writ) of attachment, upon which the sheriff had, after its service, endorsed "the within attachment superseded by judgment and execution issued thereon October 13, 1868." Also, the affidavit of a deputy sheriff, to the effect that a levy was made, under the attachment, upon the property of the Thompson Oil Company, consisting of an indebtedness from Snow, et al., &c., and an affidavit of the posting of a notice to the Thompson Oil Company of the attachment.

The record further showed that the question of the indebtedness of the defendants in the attachment was referred to a referee, no one appearing to oppose it, and that no one appeared before the referee except the plaintiffs in the attachment; that upon October 17, 1868, an execution issued against the defendants in the attachment, and was returned "No personal or real property;" that afterwards, upon the affidavit of Snow, to the effect that the judgment was said to be assigned by the Thompson Oil Company to persons whose names he did not

remember, the Court appointed William M. Tweed, Jr., receiver, who, after filing a complaint, ordered the defendants to answer, which they did, averring on information and belief that the assignment of the judgment was made before the attachment, &c. The record then showed that the attorneys for the parties had agreed in writing to refer the question of the assignment to a referee, which was done, and judgment given upon the filing of his report.

The judgment was marked satisfied June 12, 1873.

The plaintiff then demurred to the plea.

The Court below (*Vincent, P. J.*), after argument, gave judgment on the demurrer for the plaintiffs, to which the defendants took this writ of error.

Held, 1. The Thompson Oil Company was a corporation formed under the laws of this Commonwealth and doing business therein. The assignees were citizens and residents of Pennsylvania. The judgment assigned was of record in a Court of this State. When the assignment was made, the assignor, the assignees, and the property assigned, were all within this Commonwealth and governed by its laws. It was not a statutory transfer of the judgment, but a voluntary sale and assignment of it. It was then beyond all doubt a valid transfer here. Being a valid assignment when and where made, it is valid everywhere.

That the foreign attachment was served on the garnishees before they had notice of the assignment does not postpone the claim of the assignees to that of the attaching creditors.

2. We have already shown that the judgment as well as the parties to the assignment were within this State at the time of the transaction. They so continued at the time of the issuing of the writ of foreign attachment, and during the pendency of all the proceedings thereon. Neither the defendants in error, nor the

judgment which they purchased, were within the State of New York. The Court then had no jurisdiction of the persons or property of the defendants in error.

We give full effect to the Constitution of the United States and to the law of Congress enforcing the same; we assent to the conclusiveness of the judgment of a Court of a sister State when that Court has jurisdiction; yet we cannot concede that a person resident within this State, and owning property situated therein, shall involuntarily and by such a proceeding be constructively brought within the jurisdiction of the Court of another State, so as to divest his rights in that property. Article 4, sec. 1 of the Federal Constitution is not applicable.

Judgment affirmed.

Opinion by *Mercur, J.*

WILL. TESTATOR UNABLE TO READ, WRITE OR SPEAK. PROOF ON PROBATE

N. Y. COURT OF APPEALS.

*Rollwagen applt., v. Rollwagen et al.,
respt.*

Decided January 18, 1876.

When the will of one who is deaf and dumb, or unable to read or write and speak is presented for probate, there must be not only proof of the factum of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will and that he was cognizant of its provisions.

The decedent in 1871 was a man of large wealth, illiterate, not being able to read or write save to sign his name, and a widower about 64 years of age, paralytic so as to talk and speak with difficulty, and very infirm, was married to his housekeeper. He had then living three sons and grandchildren, children of a deceased daughter with whom his relations had always been friendly. His marriage was at the time unknown to the family and but

one witness was present. After his marriage decedent's infirmities increased, and during the year 1872 but few of his friends could understand anything he said. In April, 1873, his agent, who had long been in his employ, and had charge of all his real estate, was discharged and a brother of his wife, a man of not much business capacity, put in his place, and he with the wife's mother became members of decedent's family. He had then become and thereafter remained substantially helpless and speechless. His wife was his constant attendant and with her brother transacted all his business, and her wishes controlled. Many of his old friends as witnesses testified that he could not make an intelligible sound, but that his wife assuming in some way to understand him, by listening and looking at his lips would state what she claimed he expressed to to her. Other witnesses testified they could understand him, but with great difficulty. While in this condition, in June, 1873, he executed the will in question, prior to that time he had repeatedly declared that he would give all his property to his sons and the children of his deceased daughter. Two or three wills had previously been executed, all drawn by an attorney, who had been his attorney and counsel for thirty years. Soon after his last marriage a will was drawn by another lawyer, the contents of which were not known, save that his wife was a beneficiary, and his old agent one of the executors. The will in question was drawn by a lawyer who had never before been employed or consulted by decedent. He came at the request of the wife's brother. He found Mrs. R. with decedent. He attempted to talk with decedent, but found him entirely speechless and unable to utter an intelligible sound, Mrs. R. stated what she said decedent wanted, i. e. to change his then last will. She stating the changes desired, which were to give her the use of a new house lately purchased, in place of the use for life of

one mentioned in the former will and by substituting Mrs. R.'s brother in place of the old agent as executor. After drafting the will the attorney again went to the house and there found the other witnesses, the wife, mother-in-law and wife's brother, that the decedent went through the form of executing it, making the publication and the request to witnesses by an unintelligible sound and nodding his head, the other witnesses were requested by Mrs. R. to act as such none of the witnesses were witnesses to any of the prior wills. By the will in question he gave to his wife his dwelling-house in fee with furniture, and one-third of all his personal property and one-third of the net rents and income of his real estate. His real estate was not to be disposed of or divided until after the death of his wife and until his youngest grandchild then living should arrive at the age of twenty-one. The wife's brother was alone to have the leasing, collecting rents, &c., of his real estate, estimated to be worth from \$600,000 to \$800,000, with a commission of three per cent. on the gross amount for his services. Another brother of Mrs. R. was also made executor. In September, 1873, the codicils were executed under similar circumstances by the same attorney, Mrs. R. directing in regard thereto, this gave to her four houses in addition to the provision in the will, and provided that any child he might have by her should share equally with the other children.

It does not appear that any of his children knew anything of the execution of the will and codicils. A little over a month after the execution of the codicils decedent died. None of the children were present at decedent's death, Mrs. R. knowing he was dying refused to send for them.

Wm. H. Arnoux and Wm. A. Beach, for applt.

Henry L. Clinton and Geo. T. Langbien, for respta.

Held, That satisfactory evidence was not given that the testator fully understood the provisions of the will and codicils and assented thereto, that from his impaired capacity and the circumstances attending the transaction the usual inference could not be drawn from the non-formal execution; but that assuming the mind of the testator accompanied the acts, probate was properly refused on account of undue influence.

A party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator, and upon this question he has the burden of proof. If he fails to satisfy the Court that the instrument speaks the language and contains the will of the testator probate must be refused.

When the will of one who is deaf and dumb or unable to read or write and speak is presented for probate there must be not only proof of the *factum* of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language, and really expresses his will, and that he was cognizant of its provisions. 2 *Bradf.*, 42.

Judgment of General Term affirming judgment entered upon decree of Surrogate, affirmed.

Opinion by *Earl, J.*

LIFE INSURANCE APPLICATION.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPT.

Stelwagen, respt. v. The Merchants Life Insurance Company, applt.

Decided January, 1876.

It is not necessary that an applicant for life insurance should sign the application personally, he may authorize any other person to sign for him.

Not stating in the application that the assured had applied to another company for insurance does not vitiate the policy.

This action was on a policy of insurance for \$6,000 on the life of one V.

V. was solicited by one W., the medical examiner of defendant to insure his life. W. having at the time no forms for an application, examined V. as to his physical constitution, and was authorized by V. on his return home to prepare an application for V. on the proper forms and send to the company, &c., and sign his, V.'s name, to such application. This was done and the policy was issued.

On the trial defendant's counsel insisted,

1. That the application, not being signed by the assured, there was no mutual consent.

2. That the application and certificates on application sent defendant amounted to representations that the signature of V. was genuine, and that the falsity of the representation avoided the policy.

3. That the statement of the fact in the application to defendant that no other application had ever been made to any other company, was false and avoided the policy.

4. That the suppression upon the application to defendant of the facts that had transpired on the application to the other company, avoided the policy.

It was proved that V. had, prior to his application to defendant, applied to the agent of another company for insurance, and that he had been examined by two physicians, and that the physicians had refused to certify on the application that he ought to be taken by such other company on the ground that he had the heart disease, and the application was not sent forward to the company.

There was a verdict for the plaintiff.

Held, That the execution and signing of the application to defendant by W. under authority from V., was sufficient in law and the application was good. Even if it could be said that there was a representation that V. signed the application, the fact being found that he duly au-

thorized W. to sign and execute same under such representation in law true, and the validity of the policy was not affected.

That an application for insurance to an agent authorized merely to receive and transmit applications to the company when such application is not sent forward by the agent to the company, is not an application to the company.

That the question whether or not V. had the heart disease was properly left to the jury, although two physicians had decided he had heart disease in 1867 when he was examined for insurance in the first company; still, as he was a robust man, and the medical examiner of the defendant considered him sound, he was justified in supposing himself sound, and if he had at the time his application was made reasonable cause to believe himself sound, he was not guilty of concealing from defendant the existence of such disease.

Judgment affirmed.

Opinion by *Mullin, P. J.*

CHANGE OF GRADE DAMAGES

N. Y. SUPREME COURT, GEN. TERM, 1ST DEPARTMENT.

The People *ex rel.* Tytler *resp't.* v. Green et al., constituting Board of Revision and Correction and Asten et al., constituting Board of Assessors, *app'nts.*

Decided December 2, 1873.

Board of revision and correction have power to allow, and award damages to property owners, for damages done their property by changes in the grade.

Appeal from order of Special Term granting writs of peremptory mandamus. The relator owned property on 123d street. The grade of this street was changed pursuant to chap. 697, L. of 1867, the same being raised seven feet, whereby relator was obliged to raise his buildings, build cellars, &c., and was put, as he

claims, to damages amounting to \$4,000.

The new grade was completed in 1873, and the Board of Assessors assessed the expense of such grading and regulating upon the property benefited thereby, and advertised their list for objection. (Under chap. 141, L. of 1841).

The relator thereupon filed with said board his objections, namely that it had not ascertained the damage done his property, and included the amount of such damages in the expense of grading and regulating said street.

The Board then revised their assessment list, and ascertained relator's damage to be \$1,981 30, and included it in the expense of the grading, &c., of said street.

The list so corrected was sent to the Board of Revision and Correction of Assessments, which refused to ratify it, alleging a want of power to make such award, and returned it to the Board of Assessors, directing it to strike out the whole of said award.

Application was thereupon made for a writ of peremptory mandamus directed to the Board of Revision and Assessments, commanding it to confirm said list without alteration or amendment, and to the Board of Assessors commanding it to strike from its lists all awards for damage for changing the grade in said street, except the \$1,981 50 allowed to relator and such other awards to such other persons as the Supreme Court might direct.

The writ was granted.

Jas. A. Deering, for resp't.

W. C. Whiting, for appl't.

On Appeal, Held, That the right to have his loss and damages assessed under the circumstances stated in relator's petition is given by sec. 3, chap. 52, L. of 1852. The Board of Assessors created under sec. 15, chap. 303, L. of 1859, are clothed with all the power over the subject of assessments that pertain to the assessors originally provided for in the act of 1813. These points have been expressly adjudi-

cated by this Court in *People ex rel Doyle v. Green*, 10 Sup., Ct Repts 755, which was affirmed by the Court of Appeals.

There is no doubt but that the Committee of Central Park were empowered to change the grade of 123d street and to exercise in relation thereto all the power theretofore possessed by the Aldermen, &c., of N. Y., (by chap. 564 of L., 1865, and chap. 367, L. of 1866, and chap. 697, L., 1867), and that their jurisdiction over the subject matter of the grade was complete.

The order of the Board of Revision and Correction directing the assessment of relator's damage to be stricken out for want of power to make the same was erroneous, and relator is entitled to the relief by the writ of mandamus granted by Court below.

Order affirmed.

Opinion by *Davis, P. J.*

Brady, J. and *Daniels, J.* concurring.

USURY.

SUPERIOR COURT OF CINCINNATI.

James P. Kilbreth, Trustee of the Ohio Life Insurance and Trust Company, *plff.* in error, v. John W. Wright, *def.* in error.

Decided January, 1876.

It is not usury to insert in a promissory note that it shall draw interest, after maturity, at a rate in excess of that allowed by law.

Proceedings in error instituted to reverse the judgment below in favor of defendant in error, who was also defendant below.

The Court below found the note usurious and void.

The Ohio Life Insurance and Trust Company, an Ohio corporation, had the right to own and buy and sell stocks of railroad companies. It was, by its char-

ter, forbidden to loan its funds or means at a rate of interest higher than six per cent. per annum; and its charter further provided, that if it should, in any case, demand and receive more than seven per cent. per annum, as interest, its charter should thereby be forfeited. It sold to W. & Co. certain railroad stocks for the sum of \$6,000, for which it received from them \$3,000 in cash, and their note, payable to it, at its office, for \$3,000 in twelve months after date, with interest after maturity at ten per cent. per annum. To secure the payment of this note, the makers, by agreement with it, delivered the stock so purchased to a trustee of the parties, who took the note from the Trust Company with a written pledge from W. & Co. to pay the note, at maturity, and, in default, that the trustee should sell the stock and apply the proceeds to the payment of the note. The note fell due May 21, 24, 1858, and not being paid the stock was sold by the trustee on December 24, 1864, for the sum of \$2,818, which sum was credited upon the note.

In an action by the receiver of the corporation against the maker of the note, upon the plea of usury set up by the latter, he claimed the note to be void on the authority of the Bank of Chillicothe v. Swayne, 8 O. R. 257.

Held, That the maker had the right, at his option, to pay the note at maturity and thus avoid the payment of any interest whatever, and that the note could not, therefore, be usurious, as the interest was not to be paid absolutely and in any event; and not being usurious in its inception no subsequent event could make it so; the reservation of ten per cent. after maturity was in the nature of a conditional penalty for non-payment at maturity.

Judgment reversed and judgment ordered for plaintiff for the balance due.

Opinion by *Yaple, J.*

JUDGMENT ON APPEAL. PRACTICE.

N. Y. COURT OF APPEALS.

Wolsterholme, et al., *appls*, v. The Wolsterholme File Manufacturing Company, *respt*.

Decided February 22, 1876

In an action at law embracing a number of items or claims an appellate court has no power to affirm a judgment allowing one item or claim and send it back for a new trial as to another.

This action was brought to recover damages for the breach of a contract made by the defendant with plaintiffs by which, as alleged, defendant agreed to pay J. W., one of the plaintiffs, a certain salary and certain stock dividends as compensation for his services. The referee found that plaintiff J. W. was entitled to recover the salary, but that he and the other plaintiffs were not entitled to the dividends. This was affirmed by the General Term, and plaintiffs appealed to this Court from the judgment of the General Term so far as it affirmed the judgment entered on the report of the referee, adjudging that plaintiffs were not entitled to recover the dividends.

Benj. H. Austen, for *applt*.

E. C. Sprague, for *respt*.

Held, That the action being one at law plaintiffs' appeal could not be sustained without reversing the whole judgment; that in an action at law embracing a number of items or claims, an appellate Court has no power to affirm a judgment allowing one item of a claim and send it back for a new trial as to another. The error alleged as to a part necessarily reverses the entire judgment, and the reversal and new trial must be as to the whole. In equity cases appeals may be taken from part of a decree and a reversal or variation asked in accordance with the claim of the party seeking relief. Judgments also in actions at law, which are for too large an

amount, may be reduced as to a portion and affirmed as to the residue upon conditions to be stated.

Judgment of General Term affirmed.

Opinion by *Miller, J.*

MARRIED WOMAN. SEPARATE PROPERTY.

N. Y. COURT OF APPEALS.

Conlin, *respt*. v. Cantrell, *applt*.

Decided February, 1876.

A married woman, living apart from her husband and having a separate property of her own, may be made liable for domestic work done for herself and children.

This action was brought by plaintiff, who was a seamstress, to recover for work and labor alleged to have been performed by her for defendant. The defense was coverture. It appeared that the defendant was a married woman, but that she lived apart from her husband; that she had separate property of her own and was not supported by her husband. The contract for the work was made with defendant, and the work done was for herself and children. Defendant informed plaintiff that she had property of her own before the work was done, and plaintiff testified that she trusted her for that reason. Plaintiff promised to pay the debt after it was contracted as soon as she got the rents, and the proof showed that she received rents on account of her separate property.

Henry H. Morange, for *respt*.

J. H. Hildreth, for *applt*.

Held, That the circumstances of the case are such as to justify the inference that defendant intended to and actually did charge her separate estate with the plaintiff's demand, and she is entitled to recover the amount claimed.

Judgment of General Term, affirming judgment for plaintiff affirmed.

Opinion by *Miller, J.*

HUSBAND AND WIFE. SEPARATION. PRACTICE.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPT.Holt, *respt.* v. Desbrough, *applt*

Decided January, 1876.

Where a husband and wife live apart under a deed of separation by which the wife is paid a certain sum in lieu of support, in an action to recover for the wife's board evidence of cohabitation after the separation is competent to do away with the effect of the separation. In such case proof of cruel or inhuman treatment by the husband is not necessary.

It is too late to raise an objection to the complaint for the first time on appeal.

This action was brought to recover for the board of defendant's wife.

There was a judgment in the Court below for \$936 in favor of plaintiff.

Plaintiff in his complaint alleges that defendant is indebted to him for the board of his, defendant's wife. Defendant admits that the person boarded was his wife and alleges that he and wife separated and had entered into articles of separation, and in consideration of a certain sum his wife had agreed not to charge him with her support, and he had never agreed to pay her board.

On the trial plaintiff proved that, subsequent to the alleged separation between defendant and his wife, defendant had come on two or more occasions to plaintiff's house and had staid over night and slept with his wife.

Defendant for the first time on the appeal raises the question that, because no contract to pay the wife's board was alleged in plaintiff's complaint, he should have been non-suited, and the evidence given in reference thereto should be held incompetent, although no objection was made on the trial.

Defendant also insists that, in order to entitle plaintiff to recover, he should have proved on the trial that defendant had

cruelly or inhumanly treated his wife, and also that the evidence that defendant was at plaintiff's house and staid over night with his, defendant's wife, was incompetent.

Held, That it was too late an appeal for defendant to avail himself of the objection not made on the trial.

That plaintiff was not bound to show that defendant cruelly or inhumanly treated his wife, in order to entitle her to support elsewhere. An express agreement to pay her board was proved.

That the evidence of the cohabitation of defendant and his wife after the alleged separation, was competent to do away with the effect of the separation.

Judgment affirmed.

Opinion by *Mullin, P. J.*

STATUTE OF FRAUDS. EVIDENCE.
ORIGINAL UNDERTAKING,

SUPREME COURT OF PENNSYLVANIA.

Lefevre v. The Farmers & Mechanics
Bank of Shippensburg.

Decided June 9, 1875.

In an action by a bank against A to recover a balance due on an overdrawn account standing in the name of B, parol evidence tending to show that A was the real borrower, is admissible.

Error to the Common Pleas of Cumberland County.

This was an action of assumpsit, originally brought in December, 1869, by the bank, plaintiffs, to recover from the defendant, Lefevre, the sum of \$925 75, with interest, being the balance due upon an overdrawn account in the name of Gilson, Smith & Co.

At the trial, the bank, plaintiffs, offered to prove substantially the following facts, viz: (a) that the defendant, Lefevre, having contracted with the firm of Gilson, Smith & Co., to manufacture for him reapers, etc., he to furnish to them the means or credit to manufacture and pu

chase materials for the same, called on the officers of the bank and requested and arranged with them to pay checks to be drawn by Gilson, Smith & Co., (who then and previously kept an account in said bank,) the defendant undertaking and agreeing to settle the account whenever requested, no limit being fixed to the amount of credit thus to be given to said firm; that in pursuance of such arrangement the bank (plaintiff) paid, from time to time, large sums on the checks of Gilson, Smith & Co., which the defendant from time to time reimbursed to the bank, until September 17, 1869, when he notified the bank that he would no longer be responsible for the checks of said firm; and that on the date of said notice there was due to the bank an overdrawn balance on said account of \$925 75, for which this suit was brought. (b) Also "that the credit in bank was given to Lefevre alone, on his request, and on his credit, and on his agreeing to be the debtor; and that the bank never recognized Gilson, Smith & Co. as their debtors for this money."

Objected to.

Objection overruled. Exception.

The Court charged that if the jury were satisfied that the money was paid alone on the faith of defendant's credit, plaintiff was entitled to recover.

Verdict and judgment for plaintiff.

Held, The evidence was sufficient to show a direct promise by Lefevre, to the bank for a consideration moving from the latter to him, to pay the advances to be made by the Bank to Gilson, Smith & Co., on Lefevre's account and not on account of Gilson, Smith & Co. They were, according to the evidence, but the hands to receive the money, not its borrowers. This necessarily drew the case to the jury, and if found accordingly, no writing was necessary.

Judgment affirmed.

Per Curiam opinion.

NEGLIGENCE. CONTRACTORS.

N. Y. COURT OF APPEALS.

Slater et al. *respt.*, v. Mersereau *applt.*

Decided February 8, 1876.

It is no defence for a person against whom negligence which caused damage is proved, to show that without fault on his part the same damage would have resulted from the negligent act of another.

This action was brought to recover damages for injuries to goods in plaintiff's premises by the overflow of water alleged to have been caused by the negligence of defendant. It appeared that A. & Co. owned lots adjoining the premises occupied by plaintiffs, and that defendant entered into a contract with said firm to erect a building on said lots agreeably to the drawings and specifications of an architect. Defendant entered into a contract with M. & B. by which the latter agreed to do the mason work in all its departments, and to "do all the cutting away for and repairing after plumbers as shall be directed," and for their failure to do so defendant was to be responsible, he also contracted with M. & Co. for the plumbers' work and gas-fitting, including the putting up of a leader from the roof to the sewer. In both these contracts it was provided that the work should be performed "to the satisfaction and under the direction" of the architect. Defendant performed only the carpenter's work on the building. On July 20, 1868, the building was enclosed and the roofs and the leader from the roof was in position, but the waste pipe from the base of the leader to the sewer in the street, was not in place owing to the fact that the cutting of the hole for it, through the foundation wall had not been directed by defendant or made by M. & B., and the latter had also neglected to repair the street in front of said building, which they had torn up in the performance of their contract. On that night there was a heavy rain, and the water in consequence of the

failure to connect the leader with the sewer, and of the condition of the street, flowed into the cellar of the building and through the foundation wall into the premises occupied by plaintiffs, and damaged their goods.

The referee held that the water which flowed into the building from the roof did so through defendant's negligence to direct M. & B. to cut the recess for the waste pipe through the foundation wall, and that which flowed in from the street was through the negligence of M. & B., in failing to have the area completed, and as it was impossible to determine in what proportion the water which came from the roof, and that which came from the street contributed to cause the damage, defendant was liable.

F. H. Churchill for resp't.

N. C. Moak for applt.

Held, No error. That defendant in the performance of his contract possessed the same rights as the owners, and was chargeable for want of care and negligence in the exercise of his rights, if plaintiffs' property was injured thereby; that by defendant's contract with M. & B. he was bound to give such directions as were required to perform the contract, and for his failure to do so is responsible for the damages ensuing from his neglect; that under defendant's contract with A. & Co. the architect had merely a general supervision over the work to enable him to determine as to the fitness of the materials used, the manner in which the work was done, and to see that it was completed as the contract provided; 73 E. C. J. (11 C. B.) 867; 50 id. (1 C. B.) 577; 9 M. and W. 710.

This case is unlike one where the animals of several owners do damage together; where it is held that each one is not separately liable for the acts of all, as there is only a separate wrong by each. 17 Wend, 562, 1 Den., 495, 20 Barb., 479.

It is no defence for a person against whom negligence which caused damage

is proved, to show that without fault on his part, the same damage would have resulted from the negligent act of another. 38 N. Y., 260.

Judgement of General Term affirming judgment for plaintiffs on report of referee, affirmed.

Opinion by *Miller, J.*

DAMAGES.

N. Y. SUPREME COURT, CIRCUIT.

The People v. William M. Tweed and the Mayor, Alderman and Commonalty of the City of New York.

Decided March 6, 1876.

In an action brought under chapter 49 of the laws of 1875, it is no defense that some of the warrants issued by the county authorities upon the bank where the public money was deposited, were not endorsed by the payees, if the defendant procured the money thereon; it makes no difference that the plaintiffs have a remedy against the bank also.

An agreement not to sue one of several joint debtors, or one of several conspirators, does not release the others. Chapter 49 of the laws of 1875 is not unconstitutional.

Under chapter 382 of the laws of 1870, the action of the Board of Audit was judicial in its nature, but the ordinary rule, that no action can be maintained against one acting in a judicial capacity, is not applicable when the defendant corruptly agreed to make bills in which he was interested; proceedings before a party acting in such capacity, who is directly interested, are coram non iudice, and the party is not a judge.

The damages in such an action are measured by the difference between the amount fraudulently drawn or paid and the amount which could honestly have been drawn or paid.

A party to a fraudulent combination to procure money is individually liable to the full extent of the moneys wrongfully abstracted, although they may have been partially received by others acting with him.

Motion by defendant Tweed, at the close of the evidence, to dismiss the complaint as to certain items of the plaintiffs' demand, and also as to all the causes of action.

Mr. David Dudley Field, and Messrs. Field & Deyo and Mr. Edelstein, for the left., Tweed.

Messrs. Charles O'Connor, James C. Carter and Wheeler H. Peckham, for the plffs.

Westbrook, J.:

This suit has been instituted, and is sought to be maintained by force of the provisions of chapter 49 of the laws of 1875, entitled "an act to authorize the people of the State to bring and maintain certain actions for the recovery of public moneys, and property," and the general scope of the complaint may be thus stated: Section 4 of chapter 382 of laws of 1870, entitled "an act to make further provisions for the government of the County of New York," provided that "all liabilities against the County of New York incurred previous to the passage of this act, shall be audited by the Mayor, Comptroller, and the President of the Board of Supervisors, and the amounts which are found to be due shall be provided for by the issue of revenue bonds of the County of New York, payable during the year 1871, and the Board of Supervisors shall include in the ordinance levying the taxes for the year 1871, an amount sufficient to pay said bonds and the interest thereon. Such claims shall be paid by the Comptroller to the party or parties entitled to receive the same upon the certificate of the officers named therein." After referring to this provision of the act, the pleading charges that the defendant Tweed, who was the chairman of the Board of Supervisors referred to therein, instead of performing, together with his associates, the duties imposed upon him of a faithful audit of bills presented, conspired with one James Watson and others, fraudulently to pre-

sent false and fictitious claims and accounts for their own benefit and in regard to the pretended accounts of certain individuals specified in the schedule to the complaint, the gross amount of which is over \$6,000,000; such conspiracy was actually accomplished, the money obtained from the treasury, and converted to the use of such conspirators. For the amount thereof (\$6,198,957.85) with interest thereon from the first day of September, 1870, judgment is demanded against the defendant Tweed, together with the costs of the action.

It is scarcely necessary to inquire whether each and every averment of the complaint is sustained by proof to the extent charged. Without expressing, at this stage of the cause, any opinion upon the force of the evidence offered to establish the material allegations, which have been substantially recited, it is sufficient to observe that the positive testimony of Andrew J. Garvey, James H. Ingersoll, John Garvey, John H. Keyser, George S. Miller and John Kennard of conversations with Tweed and others, of acts and divisions of moneys, and of additions to and swellings of bills, make questions for the jury, whether or not the complaint is not substantially maintained in some particulars at least. It is, however, strenuously maintained that there is no proof whatever tending to show that any part of the bills in favor of Archibald Hall, Jr., A. W. Lockwood, The New York Printing Company, The Transcript Association, The Manufacturing Stationers, J. W. Smith, C. H. Jaenbus and E. Manener, for the payment of which warrants, amounting to \$611,076.40, were issued, was false, and that consequently the moneys paid thereon cannot be recovered in this action. It is true that no witness has directly testified to the falsity of the charges made thereon, but there is sufficient evidence to justify the submission of these items to the jury. None of these bills were audited in the manner prescribed by the act of

1870, so far as the evidence shows. There is no testimony evincing that the Board of Audit created by said act, of which Mr. Tweed was one, ever met as such to pass upon such claims; on the contrary, there is some affirmative proof to show it never met, and that instead of an investigation of each bill presented at the only meeting which said Board ever held (May 5th, 1870), it adopted a resolution, which substantially declared that its duties would never be discharged, and resolved that every bill collected by the County Auditor from the various committees of the Board of Supervisors for liabilities incurred prior to April 26th, 1870, should be audited and allowed by such Board of Audit, provided it was certified by the Clerk or President of the Board of Supervisors that such bill had been authorized by said Board or its appropriate committee. The bills in our considering were verified by no oath or affirmation, and no judgment of the Board of Audit was ever, so far as appears, exercised in regard to them or any of them. In addition to this, evidence has been given tending to show that a percentage to various parties, Mr. Tweed among others, was calculated upon these bills, and that 25 per cent. of the amount thereof was actually paid to the defendant. The force of the evidence to which I have referred, and the conclusion to be drawn therefrom, is for the jury. As they are ultimately to pass upon all questions of fact it would be improper to discuss this point any further. There is enough to submit these items of the plaintiffs claim to those, who under our theory of jurisprudence, make the body to determine issues of facts.

It is further objected that warrants issued to J. A. Smith, C. D. Bollar, Keyser, Davidson, Halsey & Co., and A. G. Miller, amounting to \$2,078,471 38, were never endorsed by the payees, and that consequently the money, which the Broadway Bank paid, was improperly paid, and

that in judgment of law the money obtained therein is still in the County Treasury. In deciding this point, I must assume the correctness of the plaintiff's allegations and positions upon the facts, for it is impossible for me now to say, that the jury will not so find, and if I decide upon the assumption that they will find the facts in favor of the defendant, they will then be deprived of the right to determine these matters which the law commits to them. Assuming that the endorsement of the name of the payee upon these warrants is forged, the question is not before me whether a remedy does or does not exist against the bank, but whether when the money has been actually taken from the treasury of the county, the remedy does not exist against the taker. The warrants were not drawn upon the Broadway Bank, but upon the County Treasurer at the bank. They were paid by the Treasurer through the bank, the payment recognized by, and charged to the Treasurer. If the jury find that the conspiracy to defraud existed, then as the act of one conspirator in furtherance of the common object is the act of each, each finding involves the further facts that Mr. Tweed; himself, forged the papers named, and himself obtained the money. Will it do to hold that the county cannot recover from the forger and the wrongful taker of its money the fruits of its crime, because it has also a remedy against its agent who paid its money in good faith to the party who wrongfully deceived it? Is not the conclusion obvious?

It is further urged that John H. Keyser, Andrew J. Garvey, Richard B. Connolly, James H. Ingersoll, and the estate of James Watson have been released from liability, and as they were co-conspirators with the defendant, Tweed, their release, or the release of either, discharges all. It is not urged that either Keyser, Garvey, Ingersoll or Connolly has paid any money, or obtained a formal release from any per-

son. The most that can be said is that certain influential citizens, who have been conspicuous in these prosecutions, have promised them protection. It would hardly be argued that if either should be prosecuted, any defence upon the ground of a release could be pleaded. No person authorized officially to make a promise has made any, and the entire absence of consideration would make any a *nudum pactum*, if made. In *Frink vs. Green* (5 Barbour, 445) on page 459, the court, by Paige, P. J., says: "A release of one of two or more joint debtors, whether bound jointly, or jointly and severally, discharges the original contract, and may be pleaded in bar of an action on the contract. But the release, to have this effect, must be a technical release under seal (*De Zeng vs. Bailey*, 9, *Wendell* 336; *Ronley vs. Stoddard*, 7 *John*. 207; 4 *Wend.* 365). A covenant not to sue one of the joint obligors or promisors does not amount to a release, but is a covenant only. It does not, at law, discharge either of the joint obligors or promisors, and a suit may, notwithstanding such covenant, be brought upon the original contract against all, if it was a joint contract, and against the one to whom the covenant was not given, if the contract was joint and several. (7 *John*., 210; *Hosack vs. Rogers*, 8 *Paige* 237). An agreement not to sue one of several joint debtors does not injure the other debtors. It does not defeat the right of the debtor sued to compel contribution from his co-debtors. It is not in the power of the creditor to alter the law between joint debtors. (*Catskill Bank vs. Messenger*, 9 *Cowen*. 38, per *Savage*, Ch. J)."

In regard to the estate of James Watson, it is conceded the recovery was for demands not embraced in this action, and whilst Mr. Keyser has placed property in the hands of a trustee to secure the city, such deposit was his own act, and no part thereof has been in the hands of any city official.

It is also urged upon the part of the defendant that the act of 1875, which authorizes the people to bring this action, and that despite the pendency of any other action, "by or on behalf of any public authority other than the State," is unconstitutional for various reasons. Time will not allow me adequately to discuss the questions which this point involves, and which have been so ingeniously argued and presented in the printed brief which the learned counsel for the defendant has presented. Undoubtedly these are grave questions to be hereafter considered. I have had occasion to discuss them in part in *People vs. Field* (Albany Special Term, October, 1875,) and to that opinion I refer. Were my own views in accordance with those of the counsel of the defendant, I would not, even then, be able to follow them. Upon the appeal from the order refusing to vacate the order of arrest in this cause, the General Term of this District, has passed upon this question. The opinion was written by Judge Daniels, and concurred in by his associates. (See printed papers on appeal to Court of Appeals, folio 422 to 429). That decision is binding upon me, and must be followed. If wrong it must be elsewhere corrected; it is beyond my power.

It is further urged that the Board of Audit was judicial, and that no action can be maintained against a judge for acts done in that capacity. This is undoubtedly the rule, but the proposition assumes the point to be proved. The Board of Audit was undoubtedly called upon to exercise judicial functions, and Mr. Tweed, if he had acted as a member might, if a reason, presently to be stated, did not divest him of that character, be deemed a judge. But he did not, his functions were never exercised; instead thereof, as the evidence of the plaintiffs tends to prove and which the jury must decide, he corruptly agreed to make bills. On this ground, the General Term in this very case (see opinion of Daniels before re-

ferred to, folio 413 to 418) held this action maintainable. But another reason also influences me. If the evidence of the plaintiffs is true, when these bills came before the Board of Audit (if the Board ever did meet), Mr. Tweed, and Mr. Connolly were both interested. The bills had all been increased to give them a percentage. The revised statutes of our State (2 Vol. Edmonds Edition page 284, sec. 2) declare: "No judge of any court can sit as such, in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties."

It has been held both in the Supreme Court and in the Court of Appeals (*Oakley vs. Aspinwall*, 3 Comstock, 547; *Schoonmaker vs. Clearwater & Wood*, 41 Barbour, 200, the latter case being affirmed in Court of Appeals under name of *Chambers vs. Clearwater*, 1 Keyes, 310; that when the judge is disqualified under this section, he ceases to be a judge. Tweed and Connolly, if the plaintiffs case is true, were not only corrupted by the payment of money, but were "interested" in the very claims upon which they were to pass. If under such circumstances they undertook to act, they could not, neither *de facto* nor *de jure*. The statute prohibited their sitting as judges. Its language is "no judge of any court can sit as such." They took from their shoulders the judicial ermine and its protection, when they became interested in the accounts to be presented. Their judgment was no judgment, their action no action, it was utterly *coram non judice*, and the judicial immunity is invoked in vain, because they were not judges; that, under the statutes of New York, was a legal impossibility.

The remaining question is, what damages can the plaintiffs recover, if any? That was also answered by the General Term in this case. It was there (see folio 413 of papers below referred to) said,

"these facts, which were established by the papers produced on the application for the order rendered the defendant Tweed, and those co-operating with him joint wrong-doers, and as such liable for the entire loss produced by the acts complained of. That results from the execution of the fraudulent combination in which he appears to have been the controlling individual, and in that state of the case the law will impose upon him, individually, a liability co-extensive with the moneys wrongfully abstracted, although they may have been partially received by others acting with him." If the evidence of the plaintiffs be true, the case is presented not only of an advisor of an overdraft, which the counsel for defendant put, but that of a person who has advised the overdraft, ordered it himself and distributed the proceeds. Can there be a doubt as to the rule in such a case? The damage which the wrong has caused can be recovered, even though the party did not receive all its fruits; but what is the damage? Can it be argued that a wrong caused the county to pay that which it justly owed; and can the defendant be asked to reimburse the sums which have been paid to extinguish honest debts? The argument which maintains the affirmative of this proposition assumes that the county has been damaged by the payment of that which could not have been legally enforced, and that what was owing to a party was obtained by fraud. The proposition contradicts itself, and states an impossibility. The fraud consisted in the additions to honest demands, and in this, as in all cases of a similar character, the recovery must be limited to the injury. The purchaser who retains property, the qualities of which have been fraudulently misstated, recovers the difference between the value of the property as it is, and what it should have been, if the statement made at the time of the purchase was true. And he, who has paid a bill

partly true, and partly untrue, must, while he retains the bill represented by the honest part thereof, be content with a recovery which gives back to him that which was dishonestly taken. It is scarcely necessary, however, to argue. The Court of Appeals of this State in the case of *State of Michigan vs. Phoenix Bank* (33 N. Y. 9) held that money obtained by fraudulent representations, which procured an award in its favor, could be recovered back, but only to the extent that the State was damaged by the money." That rule applies to the present action, and is decisive of it.

In reaching the conclusion that the damages to be recovered in this action are those which the alleged fraud has caused, I have not overlooked the fact that the law of 1870 contemplates and requires an audit of all claims before payment, and if there was no audit, in one sense the whole amount of the bills was illegally paid. This consideration is not so forcible to my mind as the great principle that the remedy and recovery (putting out of view all claim for punitive damages, because the complaint does not ask them) should be commensurate and only commensurate, with the injury. As the county of New York has and retains the fruit of the bills, so much as that represents should be deducted from the claim. It surely ought not to enjoy property it has purchased, and the results of labor performed, and recover the money it jointly owed therefor. This would be inequitable and unjust, and cannot be allowed.

Whilst I fully agree with the learned counsel of the defendant that the plaintiffs can only recover for the excess of the money paid beyond what was justly due the claimants, I fail to see how other claims of Keyser against the county can avail the defendant, Tweed. It was not for the payment of these other unadjusted claims that the warrants in favor of Keyser, were drawn. They were given to pa-

bills then rendered, and the money which Tweed caused to be paid thereon was no less wrongfully obtained, because Mr. Keyser had other bills not rendered, which might have been claimed but were not. The fraud took money wrongfully and that can be recovered, even though the party rendering the bill may have other valid claims still unpaid, and which he can recover. Those bills formed no basis for the payment, and the legality of the payment must stand upon the grounds then made.

It is true that Mr. Tweed has been criminally punished for the crimes, which he is alleged to have committed, but though the People punished him for those, they do not bar the civil remedy, any more than an indictment and conviction for stealing bars the civil remedy to recover the property from the thief, which the injured party brings. The code itself provides (sec. 7), "Where the violation of a right admits of both a civil and a criminal remedy, the right to prosecute the one is not merged in the other."

I have endeavored to dispose of the various points presented. The views expressed have been very hastily committed to paper. If wrong a higher court will correct them. Several of the questions are exceedingly interesting, and certainly the learned counsel for the defendant has done his simple duty to his client, and the Court in presenting and enforcing them, and to such presentation and enforcement we have listened with great pleasure and profit.

RAILROAD. REPAIRS. CHARTER.

SUPREME COURT OF PENNSYLVANIA.

Pittsburg & Birmingham Pass. Railroad Company v. the City of Pittsburg.

Decided January 6, 1876.

A passenger railway, which is required by its act of incorporation and by a city ordinance, to keep the streets, upon which its track is, in good re-

pair, is liable to clear away debris, &c., carried on to the street by an unprecedented freshet.

Error to Common Pleas No. 2 of Alleghany county.

The plaintiff was incorporated by Act of Assembly of the 13th of April, 1859, P. L. 749. It was thereby authorized, *inter alia*, to construct and maintain a passenger railway along Carson street, in the borough of South Pittsburg. Section 8 of the act declares, that the company shall not be permitted to use and occupy any of the streets in said borough for purposes of their railway, until the consent of the Council of the borough is first thereto had by ordinance duly passed; and the said company shall keep so much of the streets of said borough, from curb to curb, as may be used and occupied by them, in perpetual good repair, at the proper expense and charge of the said company.

By ordinance of 15th of August, 1859, consent was given by the borough to the company to use and occupy Carson street, in accordance with said Act of Assembly, "provided, also, that said railroad company shall keep the said Carson street in a good and sufficient state of repair, from curb to curb, to the satisfaction of the Committee on Streets, appointed under the authority of said borough, and also keep said Carson street in a reasonable sanitary condition."

The company accepted under this ordinance.

By Act of 2d of April, 1872, the borough of South Pittsburg was annexed to and made part of the City of Pittsburg. A natural ravine, of about one thousand feet in length, extends from the top of Coal Hill down near to Carson street. In July, 1874, a very heavy and extraordinary rain fell. It washed from and through the ravine, rocks, stone, gravel and earth, depositing them in Carson street, for a distance of about one hundred feet in length, and eight or ten feet in depth.

Travel over the street, either by railway or otherwise, was thereby interrupted. The plaintiffs, after requesting the city authorities to remove these obstructions, and their refusal to do so, caused them to be removed, and now claim to recover from the city the expense of that removal.

Held, That the railroad company was bound to remove the obstruction at its own expense.

Judgment affirmed.

Opinion by *Mercur, J.*; *Agnew, C. J.*, *Gordon and Woodward, J. J.*, dissenting.

WILL COMPETENCY OF WITNESSES.

SUPREME COURT OF PENNSYLVANIA.

Frew et al. v. Clark.

Decided January 6, 1876.

A paper in the form of a bond signed by decedent to take effect after his death and in the devisee's possession is a will.

The devisee named in a will is a competent witness under the Act of 1869 to prove its execution.

Error to Common Pleas No. 1 of Alleghany county.

This was a feigned issue to try the genuineness and testamentary character of a written instrument, of which the following is a copy, to wit:

"Know all men by these presents that I, James McCully, of Pittsburg, Pa., do order and direct my administrators or executors, in case of my death, to pay Robert D. Clark, the sum of seventy-five thousand dollars, as a token of my regard for him, and to commemorate the long friendship existing between us.

Witness my hand and seal this 17th day of April, A. D. 1872.

\$75,000. JAMES MCCULLY. [L. S.]

Twenty errors have been assigned, yet all the substantial matter may be considered in answering the following questions:

First. Is the instrument of a testamentary character?

Second. Is the signature thereto in the handwriting of James McCully?

Third. Was his signature obtained through fraud or imposition, or in his ignorance of the contents of the instrument.

The first is a question of law, the others questions of facts.

Clark was allowed to testify as to the genuineness of the instrument.

Held, 1. This instrument is in writing. It is signed at the end thereof. It contains no admission of indebtedness. It furnishes no evidence of a debt. It contains no promise to pay. It vested no present interest. It was not to take effect until after the death of McCully. In the meantime he could revoke it at his pleasure. It therefore possessed all the essential characteristics of a will, and was undoubtedly testamentary in its character.

2. That under the act of April 15, 1869, Clark was a competent witness.

Judgment affirmed.

Opinion by *Mercur, J.* (*Anew, C. J. Sharswood and Paxon, J. J. dissenting.*)

BURGLARY.

N. Y. SUPREME COURT—GEN'L TERM.
FOURTH DEPT.

The People v. Ticknor.

Decided January, 1876.

The breaking to constitute burglary need not be violent or with great force; to raise a window or push open a closed door is sufficient.

Writ of error to Onondaga Sessions, on a conviction for burglary.

The chief question in this case arises upon an exception to the charge of the Judge in respect to the degree of force requisite to be used in breaking into a dwelling house to constitute the crime of burglary.

The Judge charged that if the door

was fastened closely, without latch or bolt, that it would be burglary to break it open. If it fitted tightly it was burglary. To this charge the defendant's counsel excepted, and asked the Judge to charge that "if the door was not fastened, or latched, there can be no burglary; or that the door must be either bolted, locked or fastened in some way—fastened by some artificial fastening, or there can be no burglary." The Judge refused so to charge, and charged as above stated.

The counsel for the prisoner also excepted to another portion of the charge, as follows: "It would seem from the circumstances of this case, that the breaking into this house, which was fastened in the way it was, if fastened as Phelan (a witness) said it was, closed tightly, for the purpose of stealing, was burglary."

The Judge charged and intended to be understood, that if the door was closed *tightly*, without being either bolted, locked, or latched, it was burglary to open it and enter the house for the purpose of stealing.

Randal & Randal for Pltff. in error.
Wm. James, for the People.

Held, The charge was substantially correct.

Some degree of force in obtaining an entrance to a dwelling house, it was necessary to show was used, to constitute the crime of burglary. To enter by an open door is not burglary. But the breaking need not be violent, or with great force. To push open a closed door, or raise a window, is a sufficient exercise of force to constitute the crime. It is a breaking into the house within the intent and meaning of the Statute.

It was not error to charge that the possession of stolen property unexplained, is strong evidence of guilt.

There was no error in the proceedings on the trial, and the judgment must be affirmed.

Judgment affirmed.

Opinion by *E. Darwin Smith, J.*

CONSTITUTIONAL LAW. INTER-STATE COMMERCE.

U. S. SUPREME COURT.

Welton v. the State of Missouri.

Decided January, 1876.

A license tax required for the sale of goods is in effect a tax upon the goods themselves.

A statute of a State which requires the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same in the State, and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the State, is unconstitutional and void.

In error to the Supreme Court of Missouri.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the validity of a statute of that State discriminating in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other States or countries, in the conditions upon which their sale can be made by travelling dealers. The plaintiff in error was a dealer in sewing-machines which were manufactured without the State of Missouri, and went from place to place in the State selling them without a license for that purpose. For this offence he was indicted and convicted in one of the Circuit Courts of the State, and he was sentenced to pay fine of fifty dollars, and to be committed until the same was paid. On appeal to the Supreme Court of the State the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps, and stationery,

which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same, shall be deemed a peddler; and then enacts that no person shall deal as a peddler without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product, or manufacture of the State.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

Held. That the license tax exacted from dealers in goods which are not the product or manufacture of the State must be regarded as a tax upon such goods themselves: That legislation discriminating against the products of other States is in violation of that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States, and is unconstitutional and void.

The commercial power of the Federal government continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character, and that power will protect it, even after it has entered the State, from any burdens imposed by reason of its foreign origin.

The inaction of Congress, in not prescribing rates to govern inter-state commerce, when considered with reference to its legislation with respect to foreign

commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammelled.

The judgment of the Supreme Court of the State of Missouri must be reversed and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court and directing that court to discharge the defendant from imprisonment and suffer him to depart without delay.

Opinion by *Field, J.*

JUSTICE'S RETURN. CERTIORARI.
N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPT.

People ex. rel. Simmonds, *respt.*, v. Ryker, *applt.*

Decided January, 1876.

A return of a justice is held conclusive as to facts therein stated.

A justice is liable for a false return.

A reference cannot be ordered to take proof of the facts stated in a return.

Upon affidavits showing that the return of the justice is in several respects untrue. The respondent asks that such parts be stricken out or that the court direct a reference to ascertain and report the facts occurring in the proceedings before the justice.

Geo. W. Cothran, for motion.

Guersney, for relator.

Held, Upon a common law *certiorari* the return is held conclusive as to the facts alleged, and the court must give judgment upon the record and proceedings embraced in such return. It cannot consider affidavits contradicting said return in any particular. To do so would subvert the proceeding by *certiorari* and turn it in effect into an ordinary special motion. If the return is false the officer is liable to an action for a false return. Nor can the court refer it to a referee to ascertain the truth of the facts stated in the return. There is no such practice.

Motion denied.

Opinion by *E. Darwin Smith, J.*

BLACKMAIL.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

People ex. rel. Crimmins v. Morgan et al., Justices of the Special Sessions.

Decided January 28, 1876.

It is not necessary to threaten, in express words, to accuse another of a crime, in order to come within the intent of the law against blackmail, it is enough if the threat is insinuated.

Certiorari to review conviction at Special Sessions.

Crimmins called one evening upon one Wilson, to whom he was a stranger and asked to see him upon business, that he wished to see him about those postage stamps, and when asked what postage stamps, said "those stamps you sold Mr. Sweeny." Wilson replied that he neither knew Sweeny nor had he sold him any stamps.

Crimmins then said "I don't want to make you any trouble, and I don't want to go to Mr. Dana or Mr. England" (Wilson's employers), that he had got one fellow out of a scrape for selling postage stamps in an Insurance Co., and that he could fix it with Wilson, adding "You know you can't obtain \$200 worth of stamps to sell, honestly."

At the Special Sessions Crimmins was convicted of a misdemeanor.

Mitchel Laird, for relator.

B. K. Phelps, for *respt.*

On review, *Held*, That the proof given presented every essential element of the offense which the statute was designed to punish. Crimmins did not say in express words that he meant to accuse Wilson of stealing, but he insinuated that he would do so, and there was sufficient evidence for a jury to find a threat that he would make such an accusation. It is wholly immaterial in what language the threat to accuse is expressed, or whether the nature of the accusation itself is stated boldly or insinuatingly, if it be plain what the

offense intended to be threatened by the criminal was.

His sneaking, miserable suggestions were all designed to intimate to Wilson his knowledge, assumed as it was, that the latter had stolen his employer's property, and that unless he (Crimmins) was bought off, he would accuse him of it.

The court will not in a case like this seek for technical errors or indulge in hypercritical construction to shield the wrong-doer.

Judgment affirmed.

Opinion by *Brady, J.*

Davis, P. J., and Daniels J., concurring.

POWER OF ALIENATION UNDER TRUST DEED. MARRIED WOMAN.

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Louisa G. Smith v. J. Harry Thompson et al.

Decided September, 1875.

The rule may now be considered settled wherever the chancery jurisdiction exists, that a married woman is to be regarded as a femme sole in respect to her separate property; and that she may dispose of it as she pleases, unless her power of disposition is restricted or limited by the deed or will creating her interest.

Where the beneficiary in a trust deed is a married woman, and there is no restriction upon the mode in which she shall alienate the property, only that the trustee shall join in the deed; this limitation has no reference to a devise, and her testamentary capacity in regard to said property is complete.

By virtue of the act of Congress regulating the rights of property of married women, passed April 10, 1869, a married woman may dispose of her entire property, constituting her separate estate, whether such property was acquired before or after the passage of the act.

Bill to quiet title upon the following state of facts:

On the 1st of June, 1867, John O. Evans conveyed to the defendant, Moses Kelly, three sub lots in square 247, in the city of Washington, in trust for Jane Thompson, wife of defendant, J. Harry Thompson. The trust is expressed in these words: "In trust, nevertheless, for the sole use and benefit of the said Jane Thompson, and for no other person whatsoever, and only to be conveyed by her, or her heirs joining in the deed with said trustees.

Jane Thompson died on the 10th of February, 1872, seized of the equitable title to said lots, and by her last will and testament, bearing date January 24, 1871, and duly admitted to probate and recorded on the 26th of February, 1872, she gave and bequeathed the sum of \$5,000, to be equally divided among her four children, the defendants, J. Harry Thompson, Jr., Perly, Jennie and Minnie A. Thompson, to take effect when said children shall have attained their majority, and constituted said bequest a charge upon said above described real estate, and directed that the same should be sold and conveyed at the discretion of her executor to satisfy said bequest, and devised said real property, subject to the foregoing charge and any prior legal incumbrance, to her husband, the defendant, J. Harry Thompson, in fee simple, and constituted and appointed her said husband executor of said last will and testament.

Subsequently, on the 15th of April, 1873, the defendant, Kelly, trustee, as aforesaid, conveyed to the defendant, J. Harry Thompson, said real property in fee simple.

The complainant purchased a portion of the property and received a deed executed by Thompson, and gave back a trust deed to secure the purchase money.

She endeavored to raise money upon the property by giving a trust deed, and had concluded an arrangement, but her

title was rejected upon the ground that Jane Thompson, at the time she executed her last will and testament had no legal capacity to devise the said real estate, and that in order to perfect complainant's title it is necessary that the testamentary capacity of Jane Thompson in respect to this property should be judicially ascertained and determined.

The justice holding the Special Term dismissed the bill without prejudice, from which decree complainant appealed.

Held, 1. The deed of trust made by Evans to Kelly, conveying the property for the sole use of Jane Thompson, and only to be conveyed by her or her heirs joining in the deed with trustee, was no restriction of the power to devise. It applies only to a conveyance, and must be construed as giving her the right to dispose of the property absolutely by will.

2. That although a married woman, Jane Thompson had the same right to dispose of her separate estate which belongs to a *femme sole*, unless that right is limited or restricted by the deed or will creating her interest.

3. The act of April 10, 1869, relating to the disposal of their property by married women, clearly authorized Jane Thompson to dispose of this land by will, even if she had no power so to do under the trust deed made in 1867; it makes no difference that the property was acquired previous to the passage of the act.

Judgment reversed.

Opinion by *McArthur, J.*; *Wylie, J.*, dissenting.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

U. S. CIRCUIT COURT—SOUTHERN DISTRICT OF OHIO.

John W. Andrews, *exr.*, v. John W. Garrett, *et al.*

Decided October, 1875.

A suit commenced and actually tried in a State court, before the passage

of the act of Congress of March 3, 1875, but in which a new trial had been granted, and which was pending after the passage of the said act, may be removed from such State court to the Circuit Court of the United States.

On the 25th of March, A. D. 1867, suit was brought by the plaintiffs against the defendants, in the Court of Common Pleas of Muskingum County, Ohio. Attachments were issued, and certain property was attached. On the 18th day of May, 1867, the defendants filed a motion to remove the cause into the Circuit Court of the United States, on the ground that the defendants were citizens and residents of the State of Maryland, and that the plaintiffs were citizens and residents of Ohio. Upon the hearing of the motion, it appeared that one of the plaintiffs was a citizen and resident of Ohio, one a citizen and resident of Illinois, and one a citizen and resident of Minnesota. The motion was overruled. Thereupon the parties proceeded to make up the issues in said Court of Common Pleas, and at the April term, 1873, a jury was empaneled and the case submitted to the court, and judgment rendered in favor of the plaintiffs.

At the same term the plaintiffs were awarded a second trial, under the statute. Amendments were made to the pleadings, and the cause was continued from term to term until the November term, 1874, when a trial was had before a jury, and a verdict was rendered for the defendants.

At the same term the verdict was set aside, and the cause was continued till the January term, 1875.

On the 25th day of January, the cause was again continued. At the same term, to wit: April 25th, 1875, the order of continuance was set aside; and, on the same day, a petition was filed by the defendants in the State court, praying for a removal of the cause to the Circuit Court of the United States, under the provisions of the act of Congress, of March 3d,

A. D. 1875. Bond, with proper security, was filed. The grounds of removal were, that the defendants were citizens and residents of the State of Maryland, and that one of the plaintiffs was a resident of the State of Illinois, one a citizen and resident of Minnesota, and the other a citizen and resident of Ohio. This application was resisted upon the ground that the case did not come within the provisions of the act of March 3d, 1875, because not filed with the court at or before the first term at which the cause could be tried, and before the trial thereof. Upon the hearing of this petition the court, for the reason that the cause was triable and was actually tried in said court before the passage of the act of Congress, overruled said motion.

Afterwards, on the 12th day of May, 1875, the defendants filed in this court transcripts of the record and proceedings in said cause; and, afterwards, on the 6th day of October, a motion was filed in this court to strike the case from the docket on the ground of want of jurisdiction.

Held, That the proceedings removed the cause to this court; that the cause came within the act of March 3d, 1875, which is applicable to all causes pending at the time of its passage, in which no final judgment had been entered, provided the petition, &c., are filed at or before the term at which said cause could be first tried after the passage of the act.

Motion overruled.

Opinion by *Swing, J.*

INJUNCTION.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Aaron Freeman, *respt.*, v. The Panama Railroad Company et al., *appls.*

Decided March 7, 1876.

It was not the intent with which the Constitutional Provision (Sec. 16, Art. 3) was framed, that the Title of an Act of the Legislature should contain all the details set forth in the act.

The design of Constitutional provision, was to prevent the uniting of various objects having no necessary, or natural connection with each other in one bill. Geographical situs and various other circumstances, may be considered in determining the proper construction to be given to a statute.

Appeal from an order at Special Term, granting an injunction against the defendants and respondents, *pendente lite*. The injunction restrained the defendants from establishing a line of steamships, or purchasing steamships to be used on a proposed line between the Port of New York and the Port of Aspinwall, in the Republic of New Granada, and between the Port of Panama, in said republic, and the Port of San Francisco, California.

The plaintiff is a stockholder in the Panama Railroad Company. And the ground of the action as well as of the injunction, is that the defendant, The Panama Railroad Company, which is a corporation, existing under the laws of the State of New York, has no power under its charter to establish such proposed steamship line. The defendant claimed that under the following provision of the charter of the Panama Railroad Company, such power was conferred, viz: "After constituting several gentlemen, a body corporate by the name of the Panama Railroad Company, for the purpose of constructing and maintaining a railroad with one or more tracks, &c., in the Republic of New Granada, it was further in said charter provided that said company should have the power "of purchasing and navigating such steam or sailing vessels as may be proper and convenient to be used in connection with the said road, and for such purposes, all the necessary and incidental power is hereby granted to said corporation."

Plaintiff claimed that the aforesaid provision was inserted in the act for the reason, that owing to the shallowness of the bay, at the termini of the road, ships were unable to come nearer than three

and a half sea miles from such termini, and to confer upon the Panama Railroad Company the power to run lighters and small vessels, for the purpose of carrying freight and passengers from the large ships to the termini of the road, the aforesaid provision was incorporated in the charter and for no other purpose. It was further claimed by plaintiff, that if the construction claimed by the defendant was the proper construction, that the act was within the prohibition of Sec. 16, Art. 3 of the Constitution of the State of New York, which provides that "no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title."

The title of the act incorporating the Panama Railroad Co. (Laws 1849, Ch. 284) is as follows, viz.: "An Act to incorporate the Panama Railroad Company."

From the order of the Court below granting the injunction sought for this appeal was taken.

Mr. Fullerton, *for respt.*

Mr. McFarland, *for applts.*

Held, That it was clearly not the intent with which the constitutional provision was formed (Sec. 16, Art. 3) that the title of an act of the Legislature should contain all the details, and set forth every power, duty and obligation of the body corporate. The omission of such details in the title of an act, was not the mischief sought to be prevented. In the first case that arose under Sec. 16 of Art. 3 of the Constitution, the Court of Appeals held that "The design of the Constitutional provision was to prevent the uniting of various objects, having no necessary, or natural, connection with each other, in one bill, for the purpose of combining various pecuniary interests in support of the whole, which could not be combined in favor of either by itself." *Connor v. The Mayor* 1 Seld (5 N. Y.) 203. This, in substance, has been held to be the design of the Constitutional provision ever since.

It is no constitutional objection to a statute that its title is vague and unmeaning as to its purpose, if it be sufficiently plain as to the matter to which it refers. That the title here sufficiently expresses the subject of the act of incorporation.

That with reference to the act incorporating the Panama Railroad Company, we are unable to see any lack of power in the Legislature to give to said corporation power to construct and maintain a railroad, and also the power of purchasing and navigating such steam and sailing vessels from the several termini of said railroad, to and from the cities of New York and San Francisco, as may be proper and convenient to be used in connection with such railroad.

Held further, That as to the remaining question depending upon the construction of the act as to whether by the language used in the act of incorporation, the power is conferred to establish the proposed line of steamships, we are inclined to think that, taking into consideration the geographical situs of the contemplated railroad which the Legislature must be presumed to have contemplated, and that it was proposed to build the road across a narrow isthmus, and that the success of the undertaking depended altogether upon whether the corporation, by the powers and facilities granted, could make itself the carrier of a remunerative inter-ocean commerce and travel, and also the language used, the power to run such steamship line in connection with the road was conferred by the act of incorporation.

Order appealed from reversed, and injunction dissolved.

Opinion by *Davis, P. J.*; *Daniels, J.*, concurring in opinion; *Brady, J.*, in result.

ERRATA.

On page 90, vol. 2, line 24, for "assignment" read "re-assignment."

NEW YORK WEEKLY DIGEST.

Vol. 2.] MONDAY MARCH 27, 1876. [No. 7.

RAILROAD.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.Alfred Nelson, *respt.* v. The Long Island
R. R., *applt.*

Decided March 7, 1876.

*The ticket issued by a Railroad Company is not conclusive evidence of the right of the holder, but only a token or voucher, adopted for convenience, to show that the passenger has paid his fare from and to the point named.**The representation of a ticket agent who receives the money and hands out the ticket, as to the time the ticket has to run, are admissible, and binding on the Company.**That a passenger, having been ejected from a train for wrongfully refusing to pay his fare, has no right, upon an offer to pay his fare after such expulsion, to be again admitted as a passenger on the train.*

Appeal from a judgment entered on the verdict of a jury.

This action was brought to recover of the defendant the sum of \$5,000 damages, for wrongfully ejecting plaintiff from a car upon one of the trains run by the defendant. The plaintiff was expelled from one of the defendant's cars on refusing to pay the fare. The answer set up that the plaintiff, on the 3d of August, 1872, had purchased an excursion ticket from Hunter's Point to Southampton, and return at any time between the 3d and 6th of August, 1872, on which last mentioned day it should expire, and that on the 7th day of August, 1872, the day of the occurrence set forth in the complaint, the plaintiff, learning the contract had expired, voluntarily left the train of defendant.

The ticket of the plaintiff, shown by him on the 7th of August, was printed "Excursion Ticket" on the face of it,

and also "Good for One Day Only," and on the back of the same was stamped "Aug. 5th."

From the evidence on the trial it appeared that, shortly after the plaintiff took the train to Southampton, the conductor came into the car where the plaintiff was sitting and requested the fare from plaintiff, and the ticket aforesaid on being shown to the conductor, he said, "That has run out." Plaintiff said, "I guess not; I bought it on Saturday, and I told the man I bought it from I was coming back on Wednesday." The conductor said, "Yes—but the rules are different." The conductor then went to the front of the car and came back with a book, and opened it and took out the rules and said that he must do so-and-so. Plaintiff refused to pay his fare, and at the next station (Westhampton) he was put off, the conductor using no force, the plaintiff walking with him to and off on to the platform. The plaintiff immediately got into the car again, and when called upon paid his fare, \$1.15, to Manor, that being the terminus of the Sag Harbor branch of the road.

At Manor, the intersecting point of the main and branch road, the car in which plaintiff was, was hooked on to another train with another conductor. But the second conductor had been informed of the action of the plaintiff in refusing to pay his fare, and of his being put off and paying to Manor. Plaintiff did not get off the car at Manor, and after the train left that station for Hunter's Point, the second conductor came into the car where plaintiff was and asked for tickets. Plaintiff handed the same excursion ticket he had shown to the former conductor. The conductor said it was not good; it had run out—and requested his fare. Plaintiff said, "I tender this ticket as my fare;" plaintiff said, "I shall not pay, you can put me off." The car was stopped, and plaintiff was put off. Action was brought for the last expulsion. On the trial evi-

lence was admitted, under objection and exception by the defendant, that the plaintiff, after the second expulsion, offered to pay his fare and was refused admittance to the train. Also, under exception, the following conversation between the ticket agent and plaintiff was admitted;

I said to this agent: "I want to buy a ticket—an excursion ticket—to Southampton, from New York to Southampton and back again." He said it would be \$3 50. I said: "How long does this ticket run?" He said "Thursday." I said that will just suit me because I want to come back on the 7th. He said to me, "Well, I don't know about that; I think the ticket expires on Monday." said I, "Oh, no. On Sunday you do not run any trains, and Monday will be one day as I am going on Saturday afternoon; Tuesday will be two days and Wednesday three days." He said: "shall I give you a ticket." I said "Yes."

The judge in his charge to the jury left it with them to say whether the ticket agent did anything which induced plaintiff to alter his position and to buy the ticket, believing that it would be good till the 7th. The 5th of August was on Monday.

E. P. Wheeler for resp't.

A. J. Vanderpoel for appl'ts.

Held, The learned justice was right in declaring that the ticket was not conclusive of the plaintiff's rights. It was only a token or voucher adopted for convenience to show that the passenger had paid his fare from and to the points named. The plaintiff had the right therefore to show that in a conversation before his purchase from the defendants' agent, he was induced to believe that he could use the ticket on the day when he attempted to do so and was ejected. The question as to what the contract really was as to his transportation was one, therefore, to be determined by the facts disclosed. The statements of the ticket agent were binding on them.

But held that with reference to the evidence that the plaintiff tendered his fare and was refused admission to the train that was improper. If a refractory passenger is put out of the car, and by refractory is meant any one refusing to comply with the rules the company can lawfully make, he cannot demand, as matter of right, even upon complying with the rule violated, to be taken back again *eo instante*, unless he is put off at a regular stopping station, and unless at least he then and there obtains a ticket or tenders his fare. He cannot, as suggested, get himself ejected from a train, offer to pay his fare, and recover damages for being refused admission to the train. Being unable to say on which theory the jury determined the plaintiff entitled to success, the judgment must be reversed.

Opinion by *Brady, J.*; *Davis, P. J.*, concurs in result, but holds that there was no agreement to be submitted to the jury between the agent and plaintiff; *Daniels, J.*, concurs in the opinion, with modification of *Davis, P. J.*

NEGOTIABLE PAPER. SALE OF.

N. Y. COURT OF APPEALS.

Lancey, appl't. v. Clark, resp't.

Decided February 15, 1876.

Where a bank holding negotiable paper receives the money on it, on the day of its maturity, from a party to it who takes it up without informing the bank of his purpose, and transfers it to a third party, the latter takes it subject to all equities existing between the maker and the party taking it up.

This action was brought upon a promissory note made by defendant for the accommodation of the firm of Lambert & Lincoln, who had it discounted and received the proceeds. Before the note became due the firm was dissolved, and Lincoln was to close up its business. Plaintiff resided in Canada, and Lincoln wrote and requested him to take the note

and furnish the money to take it up. He sent the money a few days before the note became due to Lincoln, who put it in the bank to his individual credit. On the day the note became due Lincoln went to the bank and by his individual check paid the note to the discount clerk, who knew it was an accommodation note, without assuming to act as agent for, or asking to have the note transferred to any one, and did not mention plaintiff's name. He asked to have the note protested so that he could hold the endorser and maker, but did not state why he wished to hold them. He afterwards sent the note to plaintiff.

Thos. H. Hubbard, for applt.

C. F. Brown, for respt.

Held, That there was no sale by the bank of the note to plaintiff; that the bank could not be made a seller without its knowledge or consent; that by a sale of the note the bank would have impliedly warranted that the paper was genuine and all it purported to be on its face, and it could not be drawn into this implied warranty without its consent. (32 N. H., 238; 20 N. Y., 226; 4 Duer. 79; 5 R. I., 218; 2 Parson on bills and notes, 2d ed., 37.) That there was no transfer of the note by the bank, and plaintiff's title was derived from Lincoln and cannot be enforced against the defendant, as the note was taken subject to any defense defendant could have made if sued by Lincoln, and the note having been made for the accommodation of the firm of which he was a member he was bound as to the maker to pay it.

Order of General Term, reversing judgment in favor of plaintiff, affirmed.

Opinion by *Earl, J.*

NEGOTIABLE PAPER. NEGLIGENCE SIGNING. ESTOPPEL.
SUPERIOR COURT OF NEW HAMPSHIRE.

Citizens' National Bank v. Smith.

Decided August 12, 1875.

If the maker of a negotiable promissory

note is induced to sign it by fraud, yet in so signing acts negligently, he is liable thereon to a bona fide holder for value.

This action was, at the September term, 1874, committed to a referee, who, at this term, reported the following facts:

This is an action of *assumpsit* upon a promissory note, of which the following is a copy; "Tilton, N. H., January 1st, 1872. Nine months after date, I promise to pay, to the order of R. M. Grems, one hundred and forty dollars, at my residence in Tilton, N. H., value received and int. Due Oct. 4, '72. LORENZO SMITH." On the back of said note is the following: "Without recourse. R. M. Grems." "Demand and notice waived. Leonard Gerish." The plaintiffs purchased the note, a short time after its date, in good faith, without notice of any defect. The signature is genuine, but the note is wholly without consideration. The defendant did not contract to give any note, nor know or have any suspicion that it was a note he was signing, but was fraudulently induced by the payee to sign it under the pretence that it was an agreement to become agent of a patent hay-fork, and upon the representation by the payee that the defendant was to incur no pecuniary liability. It was a negligent act on the part of the defendant to sign the note without ascertaining whether it was what the payee represented, or something else. [At the request of the defendant, I add the following: The defendant is an old man, of limited education and poor eyesight, and is not in the habit of writing except to sign his name. To this, at the request of the plaintiffs I add the following: His daughter, an intelligent woman, was present when the note was signed, and had an opportunity to read it.] A few days after the note fell due, the defendant, having learned that the plaintiffs had it, called at the bank and examined it, and gave notice to the cashier that he should not pay it. There was no proof that payment of the note was ever de-

manded at the defendant's house. The defendant's counsel, on the day after the hearing closed, took the position, in a letter to the referee, that the action cannot be maintained for want of a demand at the defendant's house. The referee ruled, *pro forma*, that the plaintiffs are entitled to recover, and finds that the defendant did promise, in manner and form as the plaintiffs have declared, and assesses the damages in the sum of one hundred and forty dollars, and interest from January 1, 1872; but if the court shall be of opinion that upon the foregoing facts the plaintiffs are not entitled to recover, then the referee finds that the defendant did not promise in manner and form as the plaintiffs have declared.

The questions arising on the foregoing report were transferred to this court for determination by Rand, J.

Held, That the defendant would not be liable ordinarily, as his signature was obtained by fraud, but that the finding that he acted negligently in signing estopped him from denying, as against an innocent holder, the usual legal effect of his signature to a negotiable instrument, and brought the case within the principle that "where one of two innocent parties must suffer by the acts of a third, he who has enabled the third person to occasion the loss," must suffer it.

Opinions by *Cushing, C. J.*; and *Ladd and Smith, J. J.*

NOTE IN FRAUD OF COMPOSITION DEED.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

John M. Slade, Survivor, &c. *respt.* vs.
Lewis O. Wilson, *applt.*

Decided January 28, 1876.

A note given to obtain the signature of a creditor to a composition deed, the amount of which is in excess of the amount paid other creditors, is void. When a defendant, setting up such a

defence fails to establish it but is allowed, without objection, to prove, uncontradicted another, viz.: want of consideration, it is error to refuse to direct a verdict for the defendant.

Appeal from judgment entered on verdict of a jury.

This action was brought on a promissory note. Defendant was a member of the firm of L. O. Wilson & Co., who obtained from their creditors a composition deed, the creditors agreeing to take twenty per cent. to be paid by or before Jan. 1st, 1862. Plaintiffs firm signed this agreement, and on Dec. 20, 1861, received the twenty per cent. The note in this action bears date August 1st, 1861. The date of entry of the note among plaintiffs bills receivable, is Dec. 21st, 1861. Defendant alleged, that the note was given as an inducement for signing said deed, in fraud of other creditors. He fails to establish this on the trial, but was allowed, without objection, to testify that upon the delivery of said note, no consideration was paid therefor.

Held, If the note was given for transactions with L. O. Wilson & Co., prior to the payment of the twenty per cent., it ceased to have any validity after such payment, and there is no testimony tending to prove any transaction with them thereafter. A subsequent promise to pay such a note would be no more binding than the note itself, which was without consideration. The specific defense set up was not established, but the failure of consideration was, and cannot be disregarded.

The Court erred in not directing a verdict for the defendant on the ground of failure of consideration.

Judgment reversed and a new trial ordered, costs to abide the event.

Opinion by *Brady, J.*; *Davis, P. J.* and *Daniels, J.*, concurring.

EVIDENCE. ACCOUNT BOOKS.

N. Y. SUPREME COURT, GENERAL TERM
FIRST DEPARTMENT.

Betsey Mitchell, *Respt.*, v. Martin
Y. Bunn, *Applt.*

Decided Mar. 7th, 1876.

Books produced on notice by opposing counsel are competent as evidence.

Where one of a set of books, containing entries in brief and referring to other books for a fuller explanation, is received in evidence, it is competent to refer to the entries in such other books referred to, and such entries are competent evidence.

Where the books of defendant's firm, in which is an item debiting plaintiff with the note in suit, is introduced in evidence to charge defendant with personal knowledge of its issue, it is competent for him to testify that he had no such knowledge at the time, or until long afterwards.

Appeal from judgment entered on report of referee in favor of plaintiff.

Plaintiff's husband and the defendant were co-partners in trade, doing business under the firm name of Mitchell & Co. This action is brought on a promissory note given by plaintiff's husband, at the time this action was brought, deceased, to plaintiff for money alleged to have belonged to plaintiff and used in the business of said firm. The answer denied upon information and belief that Mitchell & Co made the note, and alleged that if the note was made, it was made by Mitchell for his individual indebtedness; also denied that Mitchell & Co. ever received any consideration therefor, and denied that defendant was in any way liable thereon, and by an amendment of the answer set up a counter-claim. Plaintiff was called as a witness by defendant, and on cross-examination gave evidence tending to show that she had a separate estate, consisting of moneys left her by her father, which moneys had been placed to her credit in the firm of Mitchell & Co. Plaintiff's counsel produced ledgers A &

B of Mitchell & Co. under notice for their production by defendant's counsel. The account of Betsey Mitchell was received in evidence by consent of defendant's attorney. The ledgers refer to other books from which the accounts were apparently made up. Under date of April 1st, the date of the note in suit, Mrs. Mitchell is debited "To note for balance \$577.56," the amount of the note in suit. Under date of January 23d and February 19th, 1866, appeared credits for \$300 and \$100, which plaintiff testified were proceeds from sale of her property, received by her husband. Defendant offered to show by the books of the firm and by his own testimony that no such money was received by the firm. Defendant's counsel had offered in evidence so much of the day books as referred to Mrs. M.'s account. The evidence and the books were excluded.

Ten Broeck & Van Orden for *applt.*

Edwards & Odell for *respt.*

Held, error: The day books, so far as they relate to those items, should have been received in evidence. The ledgers, having been produced on notice, were competent, and it was competent to go back to the day books to explain the items in the ledger.

Defendant was also asked, "When was the existence of this note first brought to your attention?" The answer was excluded.

Held, error. The evidence was competent to rebut, so far as it might go, the implication of knowledge presumed to be denied from the contents of the ledger.

Judgment reversed and new trial granted, costs to abide the event.

Opinion by *Davis, P. J.*: *Brady, J.*: and *Daniels, J.*, concur.

MORTGAGE. RECORDING ACT.
PRIORITY.

N. Y. COURT OF APPEALS.

Greere v. Deal et al.

Decided February 15th, 1876.

Where simultaneous purchases money mortgages are given, but recorded at

different times, an assignee of the first recorded mortgage, without notice of the mortgages being equal liens, acquires no priority over those subsequently recorded.

This was a controversy between defendants D. & W. as to surplus money arising from a sale on the foreclosure of plaintiff's mortgage. It appeared that D. & G. were the owners of the land sold subject to plaintiff's mortgage; that they conveyed the same to B., and each received from him a purchase money mortgage for the same amount, with the understanding that they were to be equal liens upon the real estate. G.'s mortgage was recorded first. After D.'s mortgage had been recorded, G. assigned his mortgage to E. P. G. This assignment was recorded. E. P. G. afterwards assigned it to W. The referee held that W. was a *bona fide* holder for value, and that the mortgage held by him by virtue of its priority upon the record had priority over D.'s mortgage, and that the surplus money should be applied thereon.

Z. S. Westbrook for applt.

Martin L. Stover for resp't.

Held, That aside from the recording act W. took his mortgage subject to the equities between G. and D., and could claim no priority. 22 N. Y., 535; *id.* 61. That there was nothing to estop D. from asserting his rights, as he did nothing to induce a purchase of the G. mortgage, and did not, by any act or omission, mislead W. or his assignor. *Morse vs. M.* Bk. 55 N. Y., 41. distinguished. That the recording act did not affect the rights of the parties (1 R. S., 756, Sec. 1), as that only applies to *subsequent* conveyances which are first recorded, and the G. mortgage was not a subsequent conveyance, but one executed at the same time; that if W., by virtue of his assignment, could be regarded as a subsequent purchaser, the statute did not aid him, as D.'s mortgage was recorded before the assignment, and as that mortgage contained a clause,

stating it was given for purchase money, it showed it was given at the same time with the G. mortgage, and that neither could have a preference, but that the only effect of the recording of an assignment of a mortgage is to protect the assignee against a subsequent sale of the mortgage itself, the recording act only applying to successive purchasers from the same sellers, 42 N. Y., 334; and that, therefore, D. and W. were entitled to share equally in the surplus.

Order of General Term, affirming order of Special Term, reversed, and that of Special Term modified.

Opinion by *Earl, J.*

SPECIFIC PERFORMANCE. EVIDENCE. POSSESSION. PRACTICE.

N. Y. SUPREME COURT, GENERAL TERM, FOURTH DEPARTMENT.

Benedict, applt., v. Phelps, resp't.

Decided January, 1876.

The Court can only order the exceptions taken in a case to be heard in the first instance at the General Term.

A parol sale of land with possession under it for twenty years makes a good title.

Where a person stands by and overhears a conversation between a deceased person and his wife it is not a personal one under statute.

Plaintiff claims to recover of defendants about 70 acres of land, and claims title under her husband's will.

Defendant disclaims title in himself, but alleges title in his wife Samantha, &c. Samantha claims title under an old agreement with her brother, Samuel B. Benedict, made in 1851, with possession for 20 years, as follows: In 1851 Samuel B. Benedict was the owner of the land in question, and proposed to sell and did sell to defendant, Samantha, the land for \$227, in payments of \$50 each, as he should call for them. Samantha was also to pay one Levi B., after the death of the mother of said Samantha the sum of \$300,

and she was also to take care of the mother of said Samuel. Defendant paid Levi the \$300, took care of the mother during her life, and Samuel never called on her for the instalments of \$50, and she is and was ready to pay the same.

Samuel never gave Samantha a deed, but she has been in possession ever since under the agreement.

Samantha in her answer asks affirmative relief that plaintiff convey said premises to her.

There was judgment for defendant.

On the trial the Court allowed the husband of Samantha to testify as to the declarations of Samuel and Levi Benedict in reference to the title of and agreement with Samantha made in his presence.

The Court ordered the case and exceptions to be heard in the first instance at the General Term.

H. C. Miner, for resp't.

L. O. Aikin, for appl't.

Held, That a Judge at Circuit has no power to order a whole case to be heard in the first instance at General Term; only the exceptions could be ordered so heard, and the verdict of the jury must be held conclusive as to facts.

That the evidence of the husband of Samantha and a co defendant as to declarations of Samuel and Levi Benedict made in his presence, in which he took no part as to the agreement between his wife and Samuel, &c., was competent. Such a transaction is not a personal one between the witness and deceased.

That the parol promise of Samuel was supported by a sufficient consideration.

The defendant actually took possession under it and has occupied ever since, and paid taxes and made valuable improvements, &c., &c. They also paid the \$300 to Levi and supported the mother, and Samuel never called on defendants for the \$50 payments. There was, in any event, a part performance, and that entitled defendant to a specific performance of it, by

means of a conveyance from the plaintiff after a performance or offer of performance of what remained to be done by her.

Judgment for defendant on the verdict.
Opinion by Gilbert, J.

PRACTICE. APPEALS.

N. Y. COURT OF APPEALS.

Lyon, resp't, v. Wilcox et al., appl'ts.

Decided January 25, 1876.

Under Chap. 322 of Laws, 1874, limiting appeals, whether or not the subject matter in controversy exceeds \$500, must be determined by the complaint and testimony, and not by the judgment alone.

This action was brought to recover \$1,000 for work, labor and services performed for the defendants. The referee dismissed the complaint, and directed judgment for the defendants for costs. On appeal to the General Term the judgment was reversed and a new trial ordered. Defendants appealed to this Court. Plaintiff moved to dismiss the appeal on the ground that the judgment was under \$500.

Held, That the subject matter in controversy, as it appeared from the complaint, testimony and findings, was over \$500, and that this was the test applied by the amendment to the code limiting appeals. (Chap. 322 Laws of 1874.

Motion denied.

Mem. by *Folger, J.*

PARTNERSHIP. PROMISSORY NOTE.

N. Y. COURT OF APPEALS.

Moess, appl't. v. Gleason et al., resp'ts.

Decided February 15, 1875.

Where one of several partners withdraws from the firm, under an agreement that the remaining partners and another shall pay all the debts, the retiring partner becomes, as be-

tween himself and former partners, a surety.

And where he procures a past due outstanding note of the old firm, to be transferred to one of his former partners, who transfers it to a third party, he is not liable thereon until the holder exhausts all his remedies against the partnership assets.

This action was brought upon a promissory note given by the firm of M. R. & Co. against the persons who were members of that firm when the note was given. Subsequently defendant G. (who alone defended), with the consent and approval of his co-partners, sold out his interest in the concern to one B., who assumed his liabilities. At that time the personal effects of the firm were more than sufficient to pay its debts. The note in suit, which was past due, was then outstanding and in the hands of a third party. G. procured a transfer thereof to defendant M. in payment of an individual debt from G. to M., and M. transferred it to plaintiff.

*Amasa J. Parker, for applt.
J. I. Werner, for respnt.*

Held, That by the transfer to B. the old firm was dissolved and a new partnership created, which held the firm property charged with a trust for the payment of its debts, including the note in suit; and G. thereafter, as between himself and his former partners, occupied the position of surety. 52 N. Y., 146; 32 id., 501; Story on Part., secs. 97 360; 3 Kent's Com., 65; 17 J. R. 525.

When, therefore, G. procured the transfer of the note to M., the latter *eo instanti* acquired a right to a credit as between him and his partners for the amount of the note; that he was not entitled to any relief as against G., at least until after exhausting all the partnership assets, he could have shown a deficiency, and that plaintiff having acquired the note after maturity, took it subject to all equities

between the parties, and did not acquire a right of action against G. thereon.

Judgment of General Term, affirming judgment for defendants, affirmed.

Opinion by Allen, J.

LEASE. MEASURE OF DAMAGES. N. Y. SUPREME COURT, GENERAL TERM. FOURTH DEPARTMENT.

Hawkins, *applt.* v. Mosher, et al, *respts.*
Decided January, 1876.

*There need not be a total failure of consideration in order to entitle a party to recover for money had and received on breach of a contract.
A referee under the provisions of the 2 R. S., 39, §36-7, cannot award costs against an unsuccessful claimant.*

This is a reference under the statute to determine a claim against the estate of one H., deceased.

In 1870, plaintiff held a lease of hotel property in Newtown, Herkimer county, which expired April 19, 1873, on which the rent for the whole term, except the last year, had been paid in advance. There were four prior mortgages on the fee of the property amounting to about \$4,000, two of which were being foreclosed, and under one of which the property was being advertised for sale.

On the day before the sale, plaintiff made an agreement with H. that if plaintiff should pay H. \$800 he, H., would cause the foreclosures to be discontinued, and would purchase all of the said mortgages and hold them until the expiration of the said lease. Plaintiff, on the same day, paid H. the money as above. H. stopped the foreclosures and purchased the mortgages under which the property had been advertised for sale, but did no other act pursuant to his agreement.

In the fall of 1870, actions were commenced to foreclose two of the mortgages aforesaid. The property was advertised to be sold December, 1870; was adjourned

to February 6, 1871 and then sold. Plaintiff, on the 24th of January, 1871, sold and assigned her interest in said lease to others for \$625, and gave possession. The referee gave judgment against plaintiff, and awarded costs against her.

J. A. & A. B. Steele for applt.

Earl, Smith & Brown for resp't.

Held, That the consideration of the agreement on plaintiff's part having failed in part at least, she was entitled to recover back a portion of the money paid by her. The rule that an action for money had and received can only be maintained when there is a total failure of consideration, does not apply to this case. H., in this case, agreed to purchase and hold four mortgages; he in fact only purchased one. The case shows a valid contract and a breach by H. It was the duty of the referee to award plaintiff nominal damages at least.

The referee had no power to award costs against plaintiff. That it was not necessary that there should be an eviction in order to entitle plaintiff to recover. That if plaintiff could not disaffirm the contract and recover back the money paid she was clearly entitled to recover for any loss occasioned by defendant's breach of the contract.

Judgment reversed.

Opinion by *Gilbert, J.*

FIXTURES.

SUPREME COURT OF PENNSYLVANIA.

H. Jarechi, Hays & Co. v. The Philharmonic Society.

Decided January 6, 1876.

Gas fixtures, chandeliers and brackets, do not pass with the sale of a house to the purchaser.

Error to the Court of Common Pleas of Erie County.

Held, The learned legal arbitrator below very properly considered himself

bound by the authority of *Vaughan v. Haldeman*, 9 Casey, 522, and decided accordingly; but his report contains a labored argument against the judgment in that case, and we are now urged by the plaintiffs in error to reconsider and overrule it. Upon the fullest consideration, however, we have determined to adhere to it. It is frankly conceded that the Act of April 14, 1855, Pamphlet L, 238, did not operate to extend the lien of mechanics to gas fixtures as distinguished from gas fittings, if a lien for the former did not exist by virtue of the Act of 1836. The distinction between the two is well stated and explained in *Vaughan v. Haldeman*. We are not satisfied that there is any usage or general understanding contrary to that opinion. Houses are considered as finished by the builders when the gas fittings are completed. The fixtures are put up in more or less expensive style, according to the taste and means of those who mean to occupy them, whether as owners or tenants. If the tenant puts them in, it is not denied that as between him and the landlord they are his, and he may remove them, or they may be sold as his personal property on an execution by the sheriff. No doubt the owner, if they belong to him, often sells them with the house. They add more to the value of the house than they would be worth if removed. But if there is no agreement to sell the house as it is—fixtures and all—the purchaser is not entitled to them. We see then no reason for departing from the judgment in *Vaughan v. Haldeman*, and the opinion therein expressed upon the construction of the Act of 1855.

Judgment affirmed.

Opinion by *Shensword, J.*

FOREIGN JUDGMENT. JURISDICTION.

SUPREME COURT OF PENNSYLVANIA.

Lowry v. Guthrie et al.

Decided November 1st, 1875.

Prima facie a Superior Court of another

State has jurisdiction over the subject matter of a judgment pronounced by it. When the record of such a Court shows jurisdiction, e. g., that the party against whom judgment was finally pronounced had himself previously instituted proceedings by filing a bill against other parties, and that all parties appeared before the Court by counsel, it is (in the absence of any allegation of fraud) conclusive, and cannot be contradicted by parol evidence in a collateral proceeding in this State.

Error to the Common Pleas of Clarion County.

This was a *scire facias* sur recognizance of bail in error, brought by Lowry against Guthrie, Stroup, McLaughlin and Fisher. Pleas, payment with leave, etc., and also adjudication and recovery of the subject matter and cause of action in the Louisville, Ky., Chancery Court.

In 1844 Wilson, Turner and Dull, trading as Dull & Co., brought an action against Lowry, who pleaded set off, and obtained judgment in his own favor for \$750. Dull & Co. took a writ of error, giving a recognizance with Guthrie and Stroup as sureties. The writ was non-prossed, and the recognizance forfeited. In 1855 Lowry brought a *scire facias* on this recognizance against Guthrie and Stroup, and obtained judgment. The defendants took a writ of error, Fisher and McLaughlin being the sureties on their recognizance, which writ was likewise non-prossed. In 1858 Lowry brought the present suit upon this latter recognizance.

In 1849 Lowry had brought suit on the original judgment, in the Circuit Court of Jefferson county, Ky., against Dull & Co., who pleaded set-off, and were about to support that plea with a claim against Lowry for the amount of three promissory notes for \$1075 with interest, drawn by him to the order of one Fulton. Lowry had given these notes as part consideration for some land he had purchased, but, discovering the title to be defective, he had refused to pay. After maturity, Fulton

had indorsed them to the defendants. Lowry filed a bill in equity in the Chancery Court of Louisville to restrain the defendants from using the notes as a set-off, and for general relief. The Chancellor by a preliminary decree enjoined the parties from proceeding at law until the hearing of the bill. From this time (1850) nothing was done until 1857, when the defendants filed an answer in the nature of a cross-bill, denying all knowledge of the consideration of the notes and making an additional claim for \$835 due them by Lowry on a certain bond. Process to bring in Lowry on this cross-bill was twice returned "not found."

The record of the Chancery Court contained an entry as follows: "At a court held March 26, 1858, came the parties by counsel, and Hon. C. W. Logan declining to sit as Chancellor herein, Hon. W. S. Bodly was elected special Chancellor." In May, 1858, the cause was heard, the defendant's counsel only being present, and was held under advisement. In July, 1858, Bullit, Lowry's attorney, filed an affidavit that he had previously had no knowledge of the cross-bill, nor had Lowry, who was not a resident of the State, and moved for a rehearing. This motion the court overruled, and made a decree in favor of the plaintiffs in the cross-bill for the amount of the notes and bond, with interest, being a larger sum than the amount of Lowry's judgment, which amount the decree ordered to be deducted. From this decree Lowry appealed, and the decree was affirmed.

Upon the trial of the present cause, before Jenks, P. J., the plaintiff put in evidence the recognizance, and rested.

The defendants offered in evidence the record of the equity suit in Kentucky.

Objected to by the plaintiff because it did not show that Lowry was within the jurisdiction of the Kentucky court, or was served with process.

In support of the objection plaintiff offered to prove by his own testimony that

he was not served with process; that he had no notice of the cross-bill; that he did not appear until the decree was made, or authorize any one to appear for him; and that he was not at the time an inhabitant of Kentucky.

Objected to as parol testimony offered to contradict a record; objection sustained; exception.

The plaintiff also offered in evidence the deposition of Bullit, that he was sole counsel for Lowry in Kentucky; that his first notice of the cross-bill was in 1858; that he was not personally present at the election of a special Chancellor, but was constructively present, as attorney for Lowry; that the proceedings did not depend upon any local or statutory rules, but upon the general Chancery practice; objected to; objection sustained; exception.

The objection to the admission of the Kentucky record was overruled, and it was admitted.

Verdict for plaintiff for \$68 (the amount of the costs), and judgment thereon.

Held, It is clear that Lowry was in court by his own act and that the defendants then went on under the practice in Kentucky to charge him in their answer in the nature of a cross-bill. Even if we might suppose the proceeding out of the usual mode of filing and prosecuting cross-bills, it was evidently recognized as the mode of proceeding in that court.

Judgment affirmed.

Per Curiam opinion.

MALICIOUS PROSECUTION. ELEMENTS OF DAMAGE.

SUPREME COURT OF PENNSYLVANIA.

Abrahams v. Cooper.

Decided February 7, 1876.

In an action for malicious prosecution evidence of plaintiff's sufferings from cold, hunger, &c., in the prison is admissible, and the jury should consider them in assessing damages.

Error to the District Court for the City and County of Philadelphia.

Action to recover damages for malicious prosecution. Plea, the general issue.

The plaintiff had been arrested, at the instance of defendant, on a charge of theft, and committed in default of bail. He was asked: "What had you to sleep on in the Station House?" Objected to on the ground that if he had suffered, the City of Philadelphia, and not defendant, was responsible for the injury. Question allowed and exception.

Plaintiff testified as follows: "I had no bed—nothing but a board—no covering but my coat. It was very cold. The wind was blowing in through the grates. I was taken from there to Moyamensing. I had nothing to eat from the time I left home till I got to the prison, about 11 o'clock the next day.

The Court charged the jury that they might take these circumstances into consideration in assessing the damages.

Verdict for \$1,000 and judgment thereon.

Held, Malice was the gist of this action, and the natural and probable consequence of the arrest was the imprisonment of the plaintiff. The suffering of the plaintiff from cold, the want of a bed to lie upon, and privation of food for many hours, sprang directly from the imprisonment to which the malice of the defendant exposed the plaintiff. Because others may have also been in fault, it does not take away the participation of the defendant in the wrong done to the plaintiff.

Judgment affirmed.

Per curiam opinion.

CONTRIBUTORY NEGLIGENCE.

N. Y. COURT OF APPEALS.

Haycroft, *respt.*, v. L. S. & M. S. R. Co., *applt.*

Decided January 15, 1870.

Whether or not an accident by which

plaintiff was injured could have been avoided by proper care and diligence is a question for the jury.

This action was brought to recover damages for injuries sustained by plaintiff at a railroad crossing on defendant's road. The plaintiff testified that at the time of the injury she was in her seventeenth year, and was passing along the sidewalk of Elk street, in the village of Dunkirk, north of defendant's tracks, some five in number; that she had crossed two of them and looked both ways to see if a train was approaching, and saw an express train coming west on the main track further south; that she stopped to let this train pass, standing within about one foot of another track. She first stated that she remained standing between the two tracks about ten minutes, but she afterwards said it was a shorter time, waiting for the express train to pass, and while thus waiting she was hit by the tender of an engine which had backed out and came along in an opposite direction from the express train, at the rate of eight miles an hour; that this train sounded no whistle, rung no bell, and gave none of the usual warnings of its approach. The evidence showed that the rear of the express train had just passed Elk street, when, at the same instant, the engine of the other train came the other way. It did not appear that plaintiff had any means of determining how long she stood between the tracks. A witness on the part of the plaintiff testified that she stood there about a minute, and other evidence showed it must have been a very short time. The Court directed a non-suit, on the ground that plaintiff was guilty of contributory negligence.

A. P. Laning, for applt.

Murray & Pattison, for respt.

Held, error: That plaintiff's testimony as to the length of time she stood between the tracks should not be considered as absolutely accurate, conclusive and controlling, and was at most but a mere impres-

sion, which, from all the circumstances of the case, may have been entirely erroneous. It was fair to presume that a very short time had elapsed before plaintiff was struck, and that plaintiff could not have turned and avoided the accident. The time she remained between the tracks, and whether the accident could have been avoided by the exercise of proper care and diligence, should have been submitted to the jury.

Order of General Term, granting motion for a new trial, affirmed.

Opinion by *Miller, J.*

LIFE INSURANCE. RECISSION. OFFER OF JUDGMENT.

N. Y. COURT OF APPEALS.

Harris, applt., v. Equitable L. As. Soc. of U. S., respt.

Decided February 15, 1876.

A renewal of a life insurance policy, which had been forfeited by non-payment of premiums, procured by fraud, is void, and an offer of judgment for the amount of the money received as premiums at the time of renewal, with interest and costs, after suit brought, is a sufficient tender to allow the company to disaffirm.

This action was brought upon a policy of life insurance issued by the defendant, which provided that if any declaration in the application upon which it was issued should prove false, then the policy should become null and void. The policy was forfeited by reason of a failure to pay the premiums due in September and December, 1869, and March, 1870. In February, 1870, the assured had a severe attack of inflammatory rheumatism, which resulted in disease of the heart, and of which she died in April following. On March 28, 1870, plaintiff went to defendant's office and tendered the premiums due and asked to have the policy renewed, stating that the assured was in good health, that she had not been sick since she was ex-

amined for insurance, and signed a paper which stated that she was as well as when insured and in as good insurable condition as when examined. Defendant accepted the premiums tendered, and gave a receipt continuing the policy in force. After the expiration of sixty days, defendant having refused to pay the amount insured, this action was commenced. Afterwards and before answering defendant served an offer of judgment for the amount of the premiums paid in March, 1870, with interest and costs. This offer was refused. The judge held that defendant was bound, upon discovery of the fraud, to return the premiums and to disaffirm the new contract, and never having done so, it was liable upon the policy, and directed a verdict for plaintiff.

A. R. Dyett, for applt.
Geo. De F. Lord, for resp't.

Held, error: That plaintiff's fraudulent representations avoided the policy; that the offer to allow plaintiff to take judgment for the amount of the premiums and interest thereon was a substantial compliance with the rule requiring a party seeking to disaffirm a contract on the ground of fraud, to return or offer to return all that he has received under the contract within a reasonable time after discovery of the fraud; if the offer had been accepted, all parties would have been restored to their former condition and equity done between them, and this is all that is required. 50 N. Y., 670. That it was no answer to say that the offer of judgment, not having been accepted within ten days, was to be deemed to have been withdrawn, as it was plaintiff's fault if he did not accept it.

Order of General Term, reversing judgment for plaintiff, affirmed.

Opinion by *Miller. J.*

TAXATION. RAIL ROAD. CERTIORARI.

N. Y. SUPREME COURT, GENERAL TERM.
FOURTH DEPT.

People ex rel Utica and Black R. R. Co., v. Shields et al.

Decided January, 1876.

In a certiorari where the collection of a tax in the hands of the City Treasurer is stayed, the Treasurer was a proper party. So also, all the assessors of the city.

The relators were liable to be taxed for personal property at actual value of stock in same manner as other personal property.

Failure of relators to furnish the assessors with the statement required by law, left it with the assessors to pass their judgment as to value of property upon same basis as upon individual property.

The relator is a Railroad Company in this State, with their principal office and a large amount of personal property in the Second Ward of the city of Utica.

In the year 1875, the assessors of said city assessed said company, on its capital stock, as personal property in said Second Ward, the sum of \$40,000, and entered same in the roll for that year under the head of rolling stock.

The said Railroad Company did not furnish to the assessors the statement showing the real estate owned by them, the amount of their capital stock and the amount paid in and secured to be paid excepting sums paid for real estate as required by Sec. 2 of title 4, Chap. 13, vol. 3 of the R. S.

The officers of the company appeared before the said assessors and asked to have said assessment stricken from the roll, on the ground that the debts owing by the company exceeded the true value of the personal property of said company. The officers of the Railroad Company did not give to the assessors any information as to the amount and value of its capital or the cost of its real estate, or any information from which the assessors could de-

termine its surplus profits or reserved funds, or the true amount of its capital stock taxable as personal property.

The assessors refused to strike off the assessment, and this certiorari was brought.

Held, That the certiorari was properly brought against the assessors and city treasurer. The tax roll had, by resolution of the Common Council, been placed in the hands of the city treasurer, and the writ stayed the collection of the tax.

The collector was not a necessary party.

That the assessors committed no error. That the Railroad Company was liable to be assessed and taxed for personal property at the actual value of their capital stock and in the same manner as other personal property. (*People v. Assessors of Brooklyn*, 39 N. Y., 81.)

That had the company furnished to the assessors the statement showing the real estate owned by them, the amount of its capital stock and amount paid in and secured to be paid in, excepting the sums paid for real estate and other matters as required by law it would have been the duty of the assessors to have adopted the data or facts embraced in such statement in making their assessment. That by reason of the failure of the company to furnish such statement, the assessors had no data to follow in making such assessment, and they were justified in forming their judgment upon the best information in their possession.

That, although the affidavit presented by the company to the assessors showing the indebtedness of the company may have been supposed to have been sufficient, it was not and did not bind the assessors, and such company were not entitled to have their debts deducted from such assessment on any such showing. The indebtedness they claimed to deduct may have been for actual valuable property purchased and now held and

owned by said company. The statement was not sufficient.

Writ of certiorari dismissed.

Opinion by *Smith, J.*

JUDGMENT LIEN. PRIORITY.

SUPREME COURT OF PENNSYLVANIA.

In re Malone v. Clinton.

Decided January 6, 1876.

A judgment creditor, whose judgment was a lien against his debtor's real estate, prior to the latter's being declared an habitual drunkard, cannot be postponed on a sale of the real estate in the payment of his claim till after the costs of the estate are paid.

Error to the Court of Common Pleas, No. 1, of Alleghany County.

This is an appeal, by one Malone, from a decree of the court, distributing the fund raised by a sale of the real estate of Wm. Clinton, an habitual drunkard. The sale was made by his committee on leave of the court. The appellant claims the money should be applied on a judgment in his favor, which is the prior lien on the land sold. After the entry of the judgment, Clinton was, by inquisition, duly found to be an habitual drunkard. It does not appear that the court then made any order in regard to the payment of the costs attending the inquisition, as is made its duty by the second section of the Act of 16th of April, 1849, *Purdon's Digest*, 881, pl. 13. These costs appear to be unpaid. There now appearing to be no personal estate out of which they can be paid, the auditor reported, and the court decreed, that they be paid out of the proceeds of the real estate. The fund is insufficient to pay the judgment of the appellant. If these costs are thus paid it takes that amount from the appellant which he would otherwise receive on his judgment. All the assignments involve the correctness of giving a preference to the payment of these costs.

Held, That the judgment creditor could

not be divested of his vested lien; that he had a prior claim, which must be paid in preference to the costs.

Decree reversed, and distribution ordered accordingly.

Opinion by *Mercur, J.*

MOTION FOR NEW TRIAL. STAY OF PROCEEDINGS. ALLOWANCE.

N. Y. SUPREME COURT, CIRCUIT, PART TWO.

The People of the State of New York against William M. Tweed and others.

Decided Mar. 21st, 1876.

The Special Term has no power to order a motion for a new trial, upon exceptions, to be heard in the first instance at the General Term, after having entertained a motion for a new trial, upon the judge's minutes; and it makes no difference that the latter motion was based upon questions of fact; the code allows no separation of the application.

Upon a motion for a stay of proceedings, without security, pending an appeal, the Court should be possessed of all the facts and circumstances relating to the appellant's means and property; in considering such an application, the recovery had is presumed to be correct, and the possession thereof ought not to be jeopardized by tying appellee's hands.

The difficulty of the legal questions involved, the length of the trial, the labor of preparing for trial, the amount of the verdict, the number of motions made in the course of the proceedings, are considered in determining whether a case is "difficult or extraordinary" for the purpose of fixing an allowance.

Motion on the part of plaintiffs for an extra allowance, and on the part of the defendant, Tweed, that the motion for a new trial be heard in the first instance at General Term, pursuant to section 265 of the code, or for a stay of proceedings, pursuant to section 348 of the code.

Messrs. O'Connor, Carter & Peckham for plaintiffs.

Messrs. D. D. Field, Field, & Deyo, and *Edelstein* for defendant Tweed.

Westbrook, J. Section 265 of the code provides for a motion for a new trial before judgment, and requires it to be heard in the first instance, "At the Circuit or Special Term, except that when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the General Term, and the judgment in the mean time suspended." Its language is incompatible with a hearing at the General Term in the first instance, when a motion at Special Term has been entertained and decided. There is, it seems to me, an absolute want of power to send the motion to the General Term in the first instance, when the Special Term has passed upon the application. And this has been expressly held. (*Hastings vs. McKinley*, 3 Code Reporter 10; *Morgan vs. Bruce* 1 Code Reporter, new series, 364; *Price vs. Keyes* 8 N. Y. Sup. Court, page 177.)

There was, in this cause, a motion for a new trial under section 264 of the code upon the judge's minutes, and that was denied. It is true that such motion was based only upon questions of fact, and not upon exceptions; but it was none the less a motion for a new trial. The 265th section of the code allows no separation of the application. The existence of exceptions is necessary to the order which sends the motion to the General Term in the first instance, but the fact that they have been taken does not authorize the Circuit or Special Term to send them to the General Term and retain the motion upon the facts for its own disposal. On the contrary, when the order to hear at the General Term is made, the Special Term loses its control of the cause, and when the Special Term hears and decides the application, the power to send to the General Term in the first instance is gone.

This conclusion disposes of the motion for a suspension of judgment upon a purely legal ground, without any consideration of the propriety of such action, which will be presently considered in examining the second motion for a stay of proceedings after judgment, pursuant to section 348 of the code, pending an appeal to the General Term from the judgment and from the order denying the motion for a new trial.

It is undoubtedly true that section 348 authorizes the Court or a judge thereof to stay proceedings upon the appeal upon such terms as shall be just, but the exercise of this discretion can only be intelligently exercised upon proof showing the condition of the defendant's property. Whilst it is true that I regard this cause as presenting difficult and extraordinary questions, worthy of review, yet I cannot, and do not, assume that errors have been in fact committed, and that the recovery is wrong. On the contrary, moderate self-respect requires me to believe that the plaintiffs are entitled to the fruits of their recovery, and that their possession thereof should not be jeopardized by arbitrarily tying their hands. If there is no property to be reached, the judgment and execution will do no harm; if there is, and execution is necessary to recover it, then such execution should not be stayed, without security sufficient to preserve it. When an appeal shall have been taken, the Court, or a judge thereof, upon an application showing all the facts, will be able to exercise an intelligent discretion, which, in the absence of such proof, it is impossible for me to do.

There can, however, be no objection to the time which the defendant needs to make a case. Ninety days is not unreasonable, but such time is not to operate as a stay of proceedings.

The application for an extra allowance remains to be disposed of. This is founded upon section 309 of the Code, which provides: "In difficult or extraordinary

cases, when a defence has been interposed, or in such cases where a trial has been had, and in actions or proceedings for the partition of real estate, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent. upon the amount of the recovery or claim, or subject matter involved." This action is conceded to be within the spirit and the letter of the statute. It certainly is both "difficult" and "extraordinary"—difficult, not only because of the legal questions involved, but also on account of the very great labor and preparation which the development of the facts upon the trial involved, and the length of time occupied with the trial itself; and extraordinary when considered with reference to the character of the issues and the amount of the verdict, and the number of motions argued previous to the trial, two of which were only finally determined by the Court of Appeals. The preparation for trial must have occupied the time of counsel for months, and the employment and compensation of proper accountants for a long time was also necessary. The trial itself also consumed several weeks, and from the number of counsel employed, I do not think that an allowance of one per cent. is unreasonable.

SALE. DELIVERY. POSSESSION. REVENUE LAWS.

SUPREME COURT OF ILLINOIS.

Straus et al. v. Minzesheimer.

Decided February, 1876.

Where the vendor of personal property, such as cigars, has done all in his power to complete its delivery to vendee, and thereafter exercises no control over and asserts no possession in the property, the vendee's title is perfect.

The relative rights of vendors and purchasers of cigars are not affected by the act of Congress of July 20, 1868, requiring the boxing and stamping of cigars before sale, so as to invali-

date, as between themselves, their contract of sale for a supposed violation of the act.

This was a suit in trespass brought by appellee, Minzesheimer, against appellants, to recover damages for the taking of 10,700 cigars to which Minzesheimer claimed title under a purchase from one Regina Blumenthal, the cigars having been levied upon and sold by appellant Ayars, a deputy sheriff, under a writ of attachment in favor of appellants, Straus and Sawyer, against Regina Blumenthal, and one Schloss, her partner. The record shows the following facts:

In 1872 Minzesheimer was in partnership with J. W. Schloss and Regina Blumenthal in the cigar business in Chicago, under the firm name of F. Minzesheimer & Co. This firm dissolved October 16, 1872, and the business was continued by J. W. Schloss and Regina Blumenthal, under the name of J. W. Schloss & Co. The new firm became indebted to Straus & Co. in the sum of about \$800. Regina Blumenthal lived in New York, and the business was conducted by Schloss in Chicago. Julius Blumenthal, husband of Regina, came to Chicago acting under a power of attorney from his wife, and dissolved the firm, Blumenthal taking the assets and agreeing to pay the firm debts. Blumenthal took charge of the firm assets, including cigars, tobacco, and fixtures at store No. 39 South Canal street, and the cigars in controversy, at factory, No. 39 Waller street. Blumenthal was to take charge of the cigars as soon as they could be packed and ready to be stamped. Before they were packed or stamped, and on the 2d of January, 1873, Minzesheimer claims to have bought the cigars of Blumenthal. The alleged sale was made at 283 West Lake street, a mile and a half from the cigars at 39 Waller street. Minzesheimer had never seen the cigars; he paid \$428 for them, and received a written memorandum of the sale. Blumenthal was to deliver them January 4, 1873. He

was a brother-in-law of Minzesheimer. On the morning of the fourth of January, Minzesheimer, who was to pay for the stamps, purchased them and went with his son and Blumenthal to the factory with two wagons. Blumenthal pointed to the cigars, gave Minzesheimer several boxes, saying: Here are your cigars." Minzesheimer looked them over, and they began stamping. Schloss' foreman, in charge of the place, then offered to stamp them with the aid of a boy, and to have them completed by 4 o'clock, which was assented to, and Minzesheimer and Blumenthal then left. About 4 o'clock of the afternoon Minzesheimer and Blumenthal came back, but in the meantime the levy had been made under the attachment writ in favor of appellants Straus and Sawyer, against Schloss & Co.

Defendant, among other things, requested the court to charge, that under the act of Congress of July 20, 1868, there could be no sale of the cigars until they were boxed and stamped, which request was refused.

Verdict for plaintiff.

Held, 1. That the title vested in plaintiff.

2. That the act of Congress in no wise affected the relative rights of the parties to this sale.

Judgment affirmed.

Opinion by *Sheldon, J.*

LIFE INSURANCE. WARRANTY. REPRESENTATION.

U. S. CIRCUIT COURT—NORTHERN DISTRICT OF OHIO.

Buell v. The Conn. Mutual Life Insurance Company.

Decided February, 1876.

Statements in the application for insurance in the declaration, or answers to the questions are either warranties or representations. If warranties, then materiality, or want of materiality as to the risk, has

nothing to do with the contract. The only question is, were they untrue, and if so, the policy is void. But if representations, then to avoid the policy, they must be substantially and materially untrue, or made for the purpose of fraud.

The rule determining what amounts to a warranty or representation stated.

This suit is founded upon a policy of insurance upon the life of Jephtha C. Buell, for the benefit of his wife, the plaintiff.

The defendant, as a second defense to the action, sets up in its answer that in the declaration made at the time of the application for insurance, among other things, the plaintiff says: "And I do hereby agree that the answers given to the following questions and the accompanying statements, and this declaration shall be the basis and form a part of the contract or policy between me and said company; and if the same be not in all respects true and correctly stated, the said policy shall be void." That among the questions in said declaration above referred to, was the following question: "Has father, mother, brother or sister of the party died, or been afflicted with consumption, or any disease of the lungs, or insanity? If so, state full particulars of each case." That the answer to the above question given by the plaintiff was as follows: "No. Father died from exposure in water; age 58. Mother living; age about 50." That the policy issued upon said declaration and questions and answers, and sued upon, contains the following condition, to wit: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers and declaration made by said Anna M. Buell, and bearing date the 19th day of March, 1866, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, in such case this policy shall be null

and void." The defendant avers that the said answer above stated was not in all respects true and correctly stated, but was incorrect and untrue in this, the father of said Jephtha C. did not die at the age of 58, but he died before he was of the age of thirty years: Wherefore the defendant says said policy was and is void and of no effect, and said plaintiff not entitled to recover any amount against the defendant.

To this answer the plaintiff files her demurrer, alleging as reason therefor, that all of said statements and allegations are redundant and irrelevant, and constitute no defense to the plaintiff's action. The demurrer admits that the answer to the question as stated in respect to the age of the father at the time of his death, was untrue and incorrect. That being the fact, does it constitute a defense to this action?

Held, Statements in the application for insurance in the declaration, or answers to the questions are either *warranties* or *representations*. If *warranties* then materiality, or want of materiality as to the risk has nothing to do with the contract. The only question is were they untrue, and if so the policy is void. But if *representations*, then to avoid the policy, they must be *substantially* and *materially* untrue, or made for purpose of fraud.

It is believed the true rule in relation to the question of what amounts to a *warranty*, or what amount only to *representation*, in the answers to questions in this class of applications, is: Where the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. The part of the answer in question in this case in reference to the age of the father at death, being a mere representation, does not constitute a defense unless

it appears to have been material as well as false.

The demurrer is therefore sustained.

Opinion by *Welker, J.*

PROMISSORY NOTE. INDEMNITY.

N. Y. COURT OF APPEALS.

Frank, respt., v. Wessels, applt.

Decided February 8, 1876.

A receipt given on the deposit of moneys, agreeing to pay the depositor or order in paper currency the amount deposited upon the return of the receipt, is a negotiable promissory note.

In an action brought thereon the defendant, under the 2 R. S., 406, is entitled to a bond of indemnity where the instrument has been lost.

This action was brought to recover a sum of money alleged to have been deposited by F., plaintiff's assignor, with defendant, for which the latter gave him a certificate or receipt, which contained an express promise to pay F. or order, in paper currency upon demand, the money loaned, with interest, upon return of the certificate. The assignment of the claim was put in evidence upon the trial, and it set forth that the certificate had been lost or stolen, and had not been indorsed by F.; that he was the owner of it and entitled to its possession, and had not, until at that date, parted with or disposed of his interest therein. Upon the trial plaintiff's counsel stated that plaintiff would indemnify defendant if required; but no bond was given. Defendant's counsel then moved for a non-suit, on the ground (among others) that the indemnity provided by statute in actions upon lost negotiable notes, 2 R. S., 406, had not been offered.

The Court directed a verdict for plaintiff without requiring him to deliver the bond.

S. S. Harris, for respt.

Samuel Hand, for applt.

Held, error: That plaintiff was bound

to furnish indemnity; that the certificate was a negotiable promissory note; that the words "upon the return of this certificate" did not make it payable upon a contingency or constitute a condition precedent to any payment, and if so, no money could be had without a return of the certificate; that the fact that the certificate had not been indorsed did not alter the case. *Patterson v. Poindexter*, 6 M. & S., 227, distinguished and limited. That the character of the certificate was not changed by the fact that it was payable in paper currency, as it must be construed as referring to legal tender paper currency, which under the U. S. laws is money.

Judgment of General Term, affirming judgment for plaintiff, affirmed, if plaintiff within thirty days gives bond of indemnity, to be approved by one of the judges of the City Court of Brooklyn, without costs of this Court to either party; otherwise judgment reversed and new trial granted.

Opinion by *Church, Ch. J.*

TRESPASS. COSTS.

N. Y. SUPREME COURT—GEN'L TERM.

FOURTH DEPT.

Smith, respt., v. Ferris, applt.

Decided January, 1876.

When lands are old under a contract of sale without a conveyance thereof, the legal title remains in the vendor.

Damages for opening a highway through such land should be awarded to and all releases should be made by the vendor.

Costs.

This action was brought for an alleged trespass on plaintiff's lands.

In May, 1872, plaintiff executed to one Spring a contract in writing for the sale and conveyance of said lands, and Spring went into possession of the same under said contract. In 1873, Spring being still in possession, made an oral agreement with one D. for the sale thereof, and D.

paid \$500 down and went into possession of said lands with Spring

The lands were assessed to S., and he and D. continued to occupy the same until 1874. In December, 1873, proceedings were taken to lay out a highway through said lands, and D. and wife, then being in possession, by an instrument under seal released all claim for damages by reason of laying out such highway. Spring also executed a similar release.

Sometime in April, 1874, Spring and D., although they had paid \$500 on the land, suffered Smith, the plaintiff, to retake the same. The defendant is the Commissioner of Highways or Street Superintendent of the village in which said lands are situated.

Defendant entered upon the lands to construct the highway, and this action was brought for the trespass. There was a verdict for plaintiff for \$150.

On the trial the court charged the jury that unless they found a verdict of at least \$50 it would not carry costs.

The main question was, whether under the holding of S. and D. of the land in suit they were, within the intent and meaning of the statutes, owners, &c.

Cheeseman & Davison, for resp't.

Martindale & Oliver, for appl't.

Held, We are of opinion that the term "owner of the land" was used in the statute applicable to this case (1 R. S. 515, § 64), as amended in 1847 (2 Lans. 1847, p. 588), in its ordinary acceptation, and imports the person who is entitled in law to the legal estate in the land. The vendee in this case had no estate in the lands. He was not, therefore, "owner of the land" within the meaning of the statute, whatever other ownership the contract conferred upon him.

The court fell into an error in informing the jury that the plaintiff must recover \$50 to entitle him to costs. The action belongs to a class of which justices of the peace are prohibited from taking

cognizance, because the title to real property came in question (Code, § 54, sub. 2, § 55). In such cases costs are allowed to the plaintiff, of course (Code, § 304, sub. 3).

For this error the judgment must be reversed and a new trial granted, costs to abide the event.

Opinion by *Gilbert, J.*

ESTOPPEL. FORMER JUDGMENT. PLEA IN BAR.

U. S. SUPREME COURT.

Gould, executrix v. Evansville & Crawfordsville Railroad Company.

Decided January, 1876.

When a former judgment is set up in bar of a pending action, it is not required to be pleaded with any greater strictness than any other plea in bar.

In the plea of a former judgment, the parties and the cause of action being the same, the prima facie presumption is that the questions presented for determination are the same unless it appears that the merits of the controversy were not involved in the issue.

A judgment rendered upon a demurrer to the declaration or other pleading in chief, is equally conclusive of the matter confessed by the demurrer as a verdict finding the same facts would be. If, however, the plaintiff fails on demurrer in his first action, for the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second.

Error to the Circuit Court of the United States for the District of Indiana.

This was an action of debt commenced by the plaintiff's testator in his life time to recover the amount of a judgment which the testator of the plaintiff, as he alleged, recovered on the third of August, 1860, against the defendant corporation, in the Supreme Court of the State of

New York, by virtue of a certain suit therein pending, in which, as the defendant alleged, the court there had jurisdiction of the parties and of the subject-matter of the action; and he also alleged that the judgment still remains in full force and not in anywise vacated, reversed, or satisfied. Defensive averments, of a special character, are also contained in the declaration, to which it will presently become necessary to refer in some detail, in order to determine the principal question presented for decision. Suffice it to remark in this connection, that the testator of the plaintiff alleged, in conclusion, that by virtue of the several allegations contained in the declaration, an action had accrued to him to demand and have of, and from the defendant corporation the sum therein mentioned, with interest from the date of judgment.

Service was made, and the corporation defendants, in the suit before the court, appeared and pleaded in bar of the action a former judgment in their favor, rendered in the County Circuit Court of the State of Indiana, for the same cause of action, as more fully set forth in the record, from which it appears that the testator of the present plaintiff, then in full life, impleaded the corporation defendants in an action of debt founded on the same judgment as that set up in the present suit, and alleged that he, the plaintiff, instituted his action in that case in the Supreme Court of the State of New York, against the Evansville and Illinois Railroad Company, a corporation created by the laws of the State of Indiana, and that the said corporation defendants appeared in the suit by attorney, and that such proceedings therein were had that he, on the third of August, 1860, recovered judgment against the said corporation defendants for the sum therein mentioned, being for the same amount, debt and cost, as that specified in the judgment set up in the declaration of the case before the court, and that the decla-

ration in that case, as in the present case, alleged that the court which rendered the judgment was a court competent to try and determine the matter in controversy, and that the judgment remains in full force, unreversed and not paid.

Superadded to that, the defendants in the present suit allege, in their plea in bar, that the plaintiff averred in the former suit that the said Evansville and Illinois Railroad Company, by virtue of a law of the State of Indiana, consolidated their organization and charter with the organization and charter of the Wabash Railroad Company, and that the two companies then and there and thereby, became one company by the corporate name of the Evansville and Crawfordsville Railroad Company, and that the consolidated company then and there by that name, took possession of all the rights, credits, effects, and property of the two separate companies, and used and converted the same, under their new corporate name, to their own use, and then and there and thereby became and were liable to pay all the debts and liabilities of the first named railroad company, of which the claim of the plaintiff in that suit is one; that the plaintiff also averred that the consolidated company from that date directed and managed the defence wherein the said judgment was rendered, and that the act of consolidation and the aforesaid change of the corporate name of the company, were approved by an act of the Legislature of the State, and that the consolidated company became and is liable to pay the judgment, interest, and cost; and that a copy of the judgment and proceedings mentioned in the declaration in that suit, as also copies of all the acts of the Legislature therein referred to, were duly filed with said complaint as exhibits thereto, and that the corporation defendants appeared to the action and demurred to the complaint, and that the court sustained the demurrer and gave the plaintiff leave to amend.

But the record shows that the plaintiff in that case declined to amend his declaration, and that the court rendered judgment for the defendants. An appeal was prayed by the plaintiff, but it does not appear that the appeal, if it was allowed, was ever prosecuted, and the present defendants aver, in their plea in bar, that the matters and things set forth in the declaration in that case are the same matters and things as those set forth in the declaration in the present suit, and that the plaintiff impleaded the defendants in that suit, in a court of competent jurisdiction, upon the same cause of action, disclosing the same ground of claim, and alleging the same facts to sustain the same, as are described and alleged in the present declaration, and that the court had jurisdiction of the parties and subject matter, and rendered a final judgment upon the merits in favor of the defendants and against the plaintiff, and that the judgment remains unreversed and in full force.

Plaintiff demurred to the plea and the defendants joined in the demurrer and the cause was continued. During the vacation the original plaintiff deceased, and it was ordered that the cause be revived in the name of the executrix of his last will and testament. Both parties subsequently appeared and were heard, and the court, consisting of the Circuit and District Judges, overruled the demurrer to the plea in bar and decided that the plea is a good bar to the action.

Instead of amending the declaration pursuant to the leave granted, the plaintiff filed a replication to the plea in bar, to the effect following, that the decision of the county circuit court of the state was not a decision and judgment on the merits of the case, but, on the contrary thereof, the judgment of that court only decided that the complaint or declaration did not state facts sufficient to sustain the action, in this, that according to the allegations of the complaint, the original

Evansville and Illinois Railroad Company, on the taking place of the alleged consolidation, as set forth in the complaint ceased to exist as a separate corporation, and that the complaint did not state any matter of fact showing a revivor of the suit against the consolidated company, or any facts which rendered such a revivor unnecessary; that the following allegations contained in the declarations in this case, and which were not contained in the complaint in the prior case, fully supply all the facts for the want of which the demurrer was so sustained by the judge of the county circuit court, and in the defence of which he, the said judge, held that the suit had abated by the consolidation.

Matters omitted in the former declaration and supplied in the present, as alleged in the replication of the plaintiff, are the following: (1) That the two companies, on the eighteenth of November, 1852, by virtue of the act to incorporate the Wabash Railroad Company, consolidated their charters and united into one company under the name and style of the Evansville and Illinois Railroad Company, and that the consolidated company under that name continued to appear to and defend the said action in the said Supreme Court. (2) That the Legislature of the State of Indiana subsequently enacted that the corporate name of the consolidated company should be changed, and that the same should be called and known by the name of the Evansville and Crawfordsville Railroad Company, by which name the defendants have ever since and now are known and called. (3) That the act of the legislature changing the name of the consolidated company was subsequently duly and fully accepted by the directors of the company, and that the company became and was liable for all acts done by the two companies and each of them. (4) That the consolidated company appeared and defended the said action in the Supreme Court of the State of New York by the name of the Evansville

and Illinois Railroad Company, and continued to defend the same until final judgment was rendered in the case. (5) That it did not in any manner appear in the former suit that the act of the legislature changing the name of the consolidated company ever went into force by its acceptance, or that the consolidated company had thereby and by the acceptance of said act become liable for all acts done by the said two companies before the consolidation, as is provided in the second section of said legislative act. Wherefore the plaintiff says that the decision in that case was not in any manner a decision upon its merits, nor in any manner a bar to this action.

Responsive to the replication the defendants filed a special demurrer and showed the following causes: (1) That the reply is insufficient in law to enable the plaintiff to have and maintain her action. (2) That the reply does not state facts sufficient to constitute a defence to the defendants' plea. (3) That the reply does not state facts sufficient to constitute a good reply nor to avoid the defendants' plea.

Hearing was had and the court sustained the demurrer to the replication and rendered judgment for the defendants, and the plaintiff sued out the present writ of error.

Held, 1. Technical estoppels must be pleaded with great strictness, but when a former judgment is set up in bar to a pending action, or as having determined the entire merits of the controversy involved in the second suit, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading.

2. It is clear that the parties in the present suit are the same as the parties in the former suit, and it can not be successfully denied that the cause of action in the pending suit is identical with that which was in issue between the same par-

ties in the suit decided in the County Circuit Court. Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same unless it appears that the merits of the controversy were not involved in the issue, the rule in such a case being, that where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatum*, and the former judgment in such a case is conclusive between the parties.

3. That a judgment rendered upon demurrer to the declaration, or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record, and the rule is that facts thus established can never after be contested between the same parties or those in privity with them, and that if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain, against the same defendants or his privies, any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless.

That if the plaintiff fail on demurrer in his first action, from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declara-

tion, were not heard and decided in the first action.

4. That the declarations in the former and the present suit are substantially the same; that the averment in the replication to the plea in bar to the contrary was an averment of a legal conclusion, and was not admitted by the defendant's demurrer thereto.

Judgment affirmed.

Opinion by *Clifford, J.*

CONVERSION. BANKRUPTCY. MARRIED WOMEN.

N. Y. SUPREME COURT—GEN'L TERM
FOURTH DEPT.

Crawford respt v. Everson, et al, appts.

Decided January, 1876.

The facts found by a referee may be reviewed by the Appellate Court.

A married woman may deal through her husband as her agent.

Notice under §5056 Bankrupt Act.

This was an action for conversion. The defendants are the assignees in Bankruptcy of one C., and plaintiff is C.'s wife. The defendants insist that the property alleged to be converted was the property of the bankrupt C. It seems that in 1866, C. being in failing circumstances sold, or pretended to sell, to one G. certain personal property. and shortly after went into bankruptcy. G. then transferred this property to plaintiff, and in 1868 C. got his discharge in bankruptcy, went into business, and in November, 1871, he went into bankruptcy again; prior to this he transferred all his property to one L. Both these transfers were for value. L. subsequently transferred to plaintiff. After the transfer to L. the property remained in C.'s possession.

The assignees under the first bankruptcy did not attack the transfer to G., or from G. to plaintiff.

The referee to whom the issues were referred found that the sale from L. to plaintiff was good and valid, and not in fraud, &c.

Geo. R. Collins, for respt.

Sedgwick, Kennedy & Tracy, for applt.

Held, That although a referee's conclusions of fact are necessarily conclusive, they may be reviewed by this court, and no exception to such finding is necessary. That there is no reason in this case to reject the referee's conclusions of fact that the assignees under the present bankruptcy cannot attack as fraudulent any transfer under the former bankruptcy.

That a married woman may make purchases of property formerly belonging to her husband, and she may make it through the intervention of her husband as her agent, &c., and she may conduct business by reason of the agency of her husband and without personally participating in its management.

That the sale to L. was in no way fraudulent.

That a referee cannot be required to find a particular fact unless it is proven by uncontradicted testimony.

That the defendants precluded themselves from objecting that a previous notice of 20 days, as required by the Bankrupt Act (1 R. S. U. S. §§ 982 and 5,056), was not given to them by retaining the property instead of tendering amends, and they also waived it by going to trial upon the merits.

Judgment affirmed.

Opinion by *Gilbert, J.*

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DISTRICT JUSTICES.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.James McCullough, *respt.*, v. The Mayor, Aldermen, &c., of New York, *applt.*

Decided March 6, 1876.

The Justices of the District Courts, under the resolution of the Common Council, approved Mar. 16, 1870, are authorized and empowered to appoint janitors for the District Courts. The provision of the charter, Chapter 335 laws, of 1873, sec. 97, with reference to the Board of Apportionment fixing the salaries of, applies to public officials, not to mere servants or employees.

Action to recover alleged balance due to plaintiff of \$625 for labor as janitor of the Second District Court, it being compensation fixed by the Common Council, at the rate of \$1,500 a year, for the months from June to October inclusive in the year 1875.

Answer set up that plaintiff was never employed by the Commissioner of Public Works, who had the sole and exclusive power to appoint janitors of the District Courts; and for a second defense that plaintiff's salary had been fixed by the Board of Estimate and Apportionment, pursuant to the powers conferred upon them by Chapter 335, laws of 1873, at \$1,200 per annum, and that plaintiff was entitled to recover compensation at the rate of \$1,200 per annum, and no more.

On the trial it appeared that plaintiff was employed by the judge of the District Court; that his work was to keep the rooms clean, make fires and go on errands for the justice, and take care of the property of the Court. That plaintiff had been paid for his services to June 1st, 1875, at the rate of \$1,500 a year, for Jan-

uary and until May at the rate of \$1,200, which was received under protest.

Plaintiff read in evidence a resolution by the Common Council, authorizing the justices of the District Court to appoint a janitor and fixing the salary at \$1,500 per annum, payable monthly. Also plaintiff's appointment by letter by one of the justices of the District Court.

Defendant put in evidence a resolution of the Court of Apportionment reducing the salaries of janitors of the Civil District Courts to \$1,200 per annum, passed Dec. 13, 1873, to take effect Jan. 1st, 1874.

Defendant then moved to dismiss the complaint, on the ground:

1. That the justice had no right to appoint the plaintiff janitor.
2. That the Common Council were not authorized to delegate the power of appointment to the justices.
3. That under the charter the Commissioner of Public Works had sole and exclusive power of employing janitors.

The judge directed a verdict for plaintiff for amount claimed—\$655.55, and directed the exceptions to be heard in the first instance at the General Term.

Elliott Sanford, for *respt.*

W. C. Whitney, corp. counsel.

Held, By Sec. 65, Chap. 334 laws of 1857, it was enacted that the corporation of the City of New York shall furnish, at the expense of the city, all necessary attendance, fuel, lights, and furniture for the District Courts. By resolution of the Common Council, approved March 16, 1870, the Justices of the District Courts were empowered to appoint a janitor at the annual salary of \$1500 a year payable monthly. That the point that the Common Council could not delegate the power of appointment to the Justice of the District Court, is not well taken. The janitor, being but a mere employee or servant and not a public officer, the duty im-

posed by the Legislature on the corporation in respect to his employment was executive and ministerial, and could we think he exercised as well through the authority given to the civil justice as by a direct employment by the Common Council itself.

The objection that, under the charter, the Commissioner of Public Works had the sole, exclusive power of employing janitors, is disposed of by the case of *Bergen vs. the Mayor*. 12 N. Y. S. C. R., 243.

As the plaintiff was in no sense a public officer but a mere servant or employe, the provision of the charter, Chap. 335 of 1873, Sec. 97, with reference to the Board of Apportionment fixing the salaries does not apply. That provision applies and was intended to apply, to the public officials of the city coming within its description, and does not extend to mere employees or servants, (47 How., 491.) The Common Council could of course discharge him altogether, and abolish the place or confer its duties upon any other servant or employee. Plaintiff is entitled to the compensation fixed by the resolution.

Motion for new trial denied, and judgment ordered for the plaintiff upon the verdict.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

TRESPASS.

N. Y. COURT OF APPEALS.

Alexander, respt. v. Hard, et al., appls.

Decided February 22, 1876.

A husband who, with his wife, resides in a house built by him, upon his wife's land, the house and land being under his control, may maintain trespass for breaking and entering the house.

Under such circumstances, the presumption is rather that the wife is residing in the house by reason of her marital

relations, rather than that she claims control or possession.

This action was brought to recover damages for breaking and entering a dwelling-house in which plaintiff, his wife, and family resided, and for trespasses alleged to have been committed by defendants while in the house. It appeared in evidence that the house was upon a farm of which plaintiff's wife owned the fee simple, that plaintiff built the house, and had lived there with his wife and children for six years. He testified without objection that during that time he had been in possession of the house and had control of it. It further appeared that he had operated the farm in his own name, owned the stock upon it, cultivated and provided for his family. The judge instructed the jury that plaintiff was not entitled to maintain an action against the defendants for breaking and entering the house, but permitted the case to go to the jury for the other damages proved.

H. G. Hotchkiss for respt.

O. W. Chapman for applt.

Held, error: That from the facts proved the jury might have inferred that plaintiff's wife had put him in possession of the farm, and consented to his building upon, occupying and controlling it, in his own name and on his own account, for the support of himself and his family; that this would be a sufficient possession to entitle him to maintain an action against a trespasser for breaking and entering the house.

Also Held, That it was more reasonable, under the facts proved, to attribute the presence of the plaintiff's wife in the house to a compliance with her marital obligations than to an intention to retain possession of the property.

Order of General Term, granting a new trial, affirmed.

Opinion by *Rapallo, J.*

REVIVOR.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Alanson Robinson, *respt.*, v. George
Brisbane et al., *appls.*

Decided Mar. 7, 1876.

A supplemental complaint may be filed to carry into effect a judgment of foreclosure upon application of the assignee of the representative of a deceased plaintiff.

A lapse of over four years from the date of the recovery of judgment, and nearly three years from the date of the assignment, does not per se work a forfeiture of the right to be allowed to file supplemental bill, but is only a circumstance bearing on the good faith of the application.

Section 121 of the code includes not only legal representatives but successors in interest.

Appeal from order allowing a supplemental complaint to be filed to carry into effect a judgment of foreclosure. This action was prosecuted by the plaintiff for the foreclosure of a mortgage given by the defendant Brisbane and his wife. Such proceedings were had in the action that on the 2nd day of February, 1870, a judgment of foreclosure was recovered and a referee was appointed to make a sale under it and convey the mortgaged premises to the purchaser. Before that was done, and on or about the 20th of May, 1870, the plaintiff died, leaving a will, which was afterwards proved, and by which he appointed two persons as his executors, one of whom qualified and became sole executor. The defendant Brisbane made three payments to the executor on the judgment October, 1870, and May, 1871. On the 30th of March, 1872, the executor assigned and transferred the bond, mortgage and judgment to Mary Robinson, who in February, 1875, applied for leave to file a supplemental complaint to carry judgment into effect. That she was al-

lowed to do, and the defendant appealed from the order. It was claimed by appellant that no action can be revived in the name of a person who is the assignee of an executor, either by motion or supplemental bill.

A. N. Weder, for applt.

Alvin Burt, for respt.

Held, That the case of *Rosell vs. Adriance*, 22 How, 97, relied upon by appellant, decided at Special Term, was based upon the supposition that the former practice did not provide for the contingency here presented, and that the code had gone no further than the former practice in this respect. The learned justice seems to have been in error in both respects. The former practice did allow bills to be filed after a decree had been recorded, but not executed, to carry it into effect after the decease of the complainant and the acquisition of his interest by another person.

Held, further, That 121 of the code provides that "in case of death, marriage, or other disability of a party, the Court, on motion, at any time within one year thereafter or afterward, on a supplemental complaint, may allow the action to be continued by or against his representatives, or successor in interest." The assignment from the executor to the applicant made her a successor in interest, and entitled her to the order made by the Court below.

The delay in making the motion did not, as a matter of course, entitle the defendant to its denial. That was merely a circumstance bearing on the good faith of the application. Her laches were not so long continued as necessarily to produce a forfeiture of her rights.

Order affirmed, with \$10 costs and disbursement of appeal.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

PRACTICE.

N. Y. SUPREME COURT, GEN. TERM,
FIRST DEPT.

Daniel W. Whitney and ano., *appls.*
v. Randolph W. Townsend, *respt.*
Decided March 6, 1876.

It is well settled that the court cannot set aside a judgment to enable a party to appeal when the time to appeal has expired. There is no power in the court directly or indirectly to extend the time to appeal.

The court is justified in regarding technical irregularities in the entry of judgment, waived by lapse of time, when there is nothing in the papers to show that the advantages gained by the respondent by reason of gross laches of the appellants is inconsistent with equity and justice.

Appeal from order of the Special Term denying motion to set aside judgment for irregularity.

The papers show that this case was tried at Special Term in April, 1867, and that judgment was directed for the defendant dismissing the complaint with costs. The judgment roll, in conformity with such judgment, was filed on the 24th October, 1867, and judgment docketed for \$201, costs and disbursements. From that judgment the present appellants appealed to the General Term, where the judgment of the Special Term was affirmed on the 30th of December, 1869, as appears by an order duly entered by the clerk on that day. By the order of the General Term the judgment was affirmed with costs to the respondent, to be adjusted by the clerk of the court. On the 9th of November, 1872, a judgment roll of the judgment of affirmance was filed in the office of the clerk, but no costs of appeal were taxed and no judgment for costs was entered or docketed. The judgment roll was regular in form, and the respondent states in his affidavit that he directed the managing attorney of his law firm to waive costs and enter up and perfect judgment without costs. No judgment for costs, on that account, was docketed.

In November, 1874, the plaintiffs moved the court, upon affidavits stating in substance that no judgment had been entered upon the appeal to the General Term, for an order directing them to enter judgment, which motion was denied on the ground that judgment had been entered. Afterwards plaintiffs served notice of appeal from the judgment, which was returned as too late.

The irregularities alleged were in substance that the judgment was not entered in the proper judgment book, and that it was entered without costs; that the judgment roll was not filed with the equity clerk in the clerk's office, but left by the defendant with the common law clerk, and placed with common law papers in the clerk's office, whereby no judgment was or could be docketed.

H. L. Clinton and H. E. Davenport, for *appls.*

A. J. Vanderpool and A. K. Dyer, for *respt.*

Held, It is well settled that the Court cannot set aside a judgment to enable a party to appeal when the time to appeal has expired. There is no power in the court to extend the time to appeal. It cannot do indirectly that which it cannot do directly. Under section 331 no notice of entry of judgment is necessary to limit the time to appeal. In this respect an appeal to the Court of Appeals from a judgment, differs from an appeal to the Court of Appeals from an order, and also from an appeal to the General Term from an order or judgment made or entered at the Special Term. In the last two cases notice of the entry of the order or judgment must be given to limit time to appeal (Code, secs. 331 and 332). The plaintiff knew, or could have ascertained without difficulty, that the General Term had affirmed the judgment of the Special Term. If, after searching in the County Clerk's office, they were unable to find that any judgment of affirmance had been

entered, it was within their power long since to have made the motion which they did not make until November, 1874, to compel the defendant to enter judgment so that they could appeal. They saw fit not to do so, and left the defendant in possession of the property involved in this suit. This seems to us to have been gross laches on their part. There is no reason to presume that the judgment of the Special Term and the affirmance by the General Term are not strictly legal and just, and there is nothing in the papers to show that the advantage gained by the respondent by reason of the gross laches of the appellant, is inconsistent with equity and justice.

Under such circumstances, even if there appeared to be technical irregularities, the court would be justified in regarding them as waived by lapse of time.

The order should be affirmed, with costs.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

NATIONAL BANKS. EXCESS OF INTEREST. PENALTY.

N. Y. COURT OF APPEALS.

Hintermister, applt. v. First National Bank of Chittenango, respt.

Decided February 15, 1876.

Under sec. 5198 of the U. S. R. S. relating to penalties against National Banks for receiving a greater rate of interest than is allowed by law, no recovery can be had beyond twice the sum of the interest paid in excess of the legal rate.

This action was brought against defendant, a bank organized under the national bank act of May 3, 1864 (13 U. S. Stat. at Large, 99, 110), to recover the penalty given by sec. 30 (U. S. R. S., sec. 5198) of said act, for recovering a greater rate of interest than is allowed by law, to wit: "Twice the amount of the interest thus paid." Plaintiff recovered a judgment

for twice the amount of all the interest paid.

Wm. E. Lansing, for applt.

D. D. Walrath, for respt.

Held, That the language of said section is satisfied by restricting the recovery to twice the sum of the interest paid in excess of the legal rate; that the first clause of the section forfeiting the entire interest only applies in case of actions brought to enforce the usurious contract. 72 Penn. St., 209.

National Bank of Whitehall v. Lamb, 50 N. Y., 95, and *Farmers' Bank of Fayetteville v. Hale*, 59 id., 53, held to be overruled by the decision of the U. S. Supreme Court in *F. & M. Nat. Bank v. Deering*.

Also held, That as the act of 1864 under which this action was brought regulated the recovery by the amount illegally received and taken, and did not give a fixed sum as an arbitrary penalty, the party entitled to maintain the action could recover the amount paid for usury within two years prior to the commencement of the action whether the amount has been paid in one or several payments. *Sturgiss v. Shofford*, 45 N. Y., 446, and *Fisher v. N. Y. O. & H. R. R. R. Co.*, 46 id., 644, distinguished.

Order of General Term reversing judgment for plaintiff and granting new trial modified, and judgment of Special Term reversed, and new trial granted unless plaintiff stipulate to reduce judgment to twice the amount of the illegal interest, in which case judgment affirmed.

Opinion by *Allen, J.*

CHANGE OF VENUE.

N. Y. SUPREME COURT—GENERAL TERM. FIRST DEPARTMENT.

Kelly, respt. v. Maltham, et al, applts.

Decided December 1875.

Affidavit and notice to change venue for convenience of witnesses should set out

the grounds for belief that witnesses are material.

Appeal from order denying motion to change place of trial.

This action was brought to recover for damage alleged to have been done to plaintiff's canalboat while lying in the canal basin of Buffalo harbor, by defendant's tug colliding with the same through negligence and mismanagement. The venue was laid in New York county. This, defendant seeks to change, 1st. Because it is not the proper county, in that the alleged injury occurred, if at all, in Erie county; that all of defendants reside in Erie county, and that plaintiff lives upon his canal boat, having no other residence.

2d. For convenience of witnesses, giving a long list of witnesses, and what he intends to prove by them, but states no grounds for his expectation that they will so testify, nor any allegation that they said they would so testify.

Plaintiff swore to a residence in New York City, and gave the names of many material witnesses residing in New York County, what they will testify to, and the reason why he expects that they will so testify. The court denied the motion.

McKay & Kelly for resp't.

Thaddeus C. Davis for applts.

On appeal.

Held, That the court below seemed satisfied, by plaintiff's affidavit, that he was a resident of New York City at the time of the commencement of this action. This disposes of the first ground.

The affidavit as to the convenience of witnesses was defective, not conforming to the rules and practice of the court. It does not appear whether the motion was denied by the court below because of this defect, but the imposition of costs which is unusual when such motions are denied on the merits, renders this probable.

It is evident that the cause of action arose altogether in the city of Buffalo, and it is highly probable that the principal

witnesses, for both parties, are residents there, and since the motion was probably denied because of defects in the affidavit, we think that the order should be so modified as to allow defendants to renew the motion on other papers on the payment of costs granted below.

Order so modified.

Opinion by *Davis, P. J.*; *Brady, J.* and *Daniels, J.*, concurring.

PARTNERSHIP.

N. Y. COURT OF APPEALS.

Arnold et al, ex'rs., &c., applts., v Nichols, impleaded, &c., resp't.

Decided February 1, 1876.

Where, upon the formation of a copartnership, it is agreed that the new concern shall take the assets of one of the partners and pay a'l his specified debts, such promise inures to the benefit of the creditors of him whose assets were so taken.

And so long as the incoming partner retains the assets, he cannot defend upon the ground he was fraudulently induced to make the agreement.

This action was brought to recover the sum of \$2,000 loaned by plaintiff's testator to B., who had been engaged in business as importer on August 15, 1867. B. continued in business alone until January, 1868, when he formed a copartnership with defendant, N., and under the firm name of B. & Co., carried on the business until May 1, 1869. The evidence tended to show that when the copartnership was formed B. transferred his business assets to the firm of B. & Co., and in consideration thereof, the firm assumed and agreed to pay certain specified debts of B., among which was that to plaintiff's testator. The assets were more than sufficient to pay the debts assumed. They were first to be used to pay debts, and the balance B. was to be credited with.

Benj. K. Phelps, for applt.

W. Howard Wait, for resp't.

Held, That as B. transferred to B. & Co. the assets to which his creditors had a right to look for the payment of their claims, it must be deemed that the promise of B. & Co. to pay such claims was made for the benefit of the creditors, and plaintiff's testator was entitled to adopt the promise as especially for his benefit. 20 N. Y., 268; 24 id. 178; 48 id.; 253; 54 id. 581; Norrell v. Irur, 55 N. Y., 270, distinguished.

The defendant N. alleged in his answer that he was induced to enter into the agreement by the fraud of B., but he did not allege that he had rescinded the agreement on that account, or that he had ever suffered any damages on account of it. He offered to prove, upon the trial, this allegation and the court excluded the evidence.

Held, no error. That N. could not retain the fruits of the agreement and refuse on account of fraud to bear its burdens; that fraud could in no aspect of the case furnish a total or partial defence to the action as the firm had more than sufficient assets transferred to it by B. to pay all debts assumed.

The judge charged the jury that if they found that there was an agreement between B. and N., in entering into the co-partnership, that B & Co. should take the business assets of B., and in consideration thereof pay the specified liabilities of B., the plaintiffs were entitled to recover, and that if they found there was not such an agreement, they are not entitled to recover.

Held, no error. That this charge fairly covered the case.

Order of General Term reversed and judgment entered on verdict affirmed, with costs.

Opinion by *Earl, J.*

FIRE INSURANCE. WARRANTY. AGENT.

N. Y. COURT OF APPEALS.

Alexander, *respt.*, v. Germania Ins. Co., *applt.*

Decided February 22, 1876.

Where a party accepts a policy containing the words "Occupied as a dwelling," it amounts to a warranty that the premises are occupied, and if the policy provided "if the premises became vacant and unoccupied the policy should be void," and they were actually unoccupied when the insurance was effected, it avoids the policy, and knowledge upon the part of the Company's agent that the premises were vacant, does not affect its validity.

An agreement in a policy that any person other than the assured, who procures the insurance should be deemed the agent of the assured is operative.

This action was brought upon a policy of insurance upon an unoccupied dwelling belonging to plaintiff, which was unoccupied when the insurance was applied for, defendant's agent knew that the building was not occupied. The policy stated that the insurance was upon plaintiff's "two-story and extension frame shingle roof building occupied as a dwelling." It also provided, that in case the premises became vacant and unoccupied, the policy should become void.

Held, That the statement in the policy that the building was occupied as a dwelling was a warranty, and the breach thereof avoided the policy. 7 N. Y., 370; 13 Conn., 544; 54 N. Y., 193.

Also held, That knowledge by defendant's agent, that the building was unoccupied at the time the insurance was effected, could not affect the validity of the warranty. 20 N. Y., 52; Rowley v. Empire Ins. Co.; 20 N. Y. 550, distinguished.

The policy contained an agreement that any person other than the assured, who might have procured the insurance to be taken by the company should be deemed to be the agent of the assured

and not of the company, in all transactions relating to the insurance.

Held, That this clause was operative and precluded the assured from claiming that the company was bound by the knowledge of the agent, through whom the policy was procured. Knowledge by an agent authorized to take application, of the falsity of a warranty, does not affect its validity—20 N. Y., 56.

Judgment of General Term, affirming judgment in favor of plaintiff, reversed and new trial granted.

Opinion by *Rapallo, J.*

COMMON CARRIER. NEGLIGENCE. DAMAGES.

N. Y. COURT OF APPEALS.

Sherman et al., respts., v. The H. R. R. Co., applt.

Decided February 22, 1876.

A common carrier is bound to transport goods within a reasonable time, and if he negligently omits to do so, is liable for the damages occasioned thereby.

The damages, in such case, are measured by the difference between the value of the goods when they ought to have been delivered, and their value at the time of their actual delivery.

The carrier is bound to give notice, or do what the law esteems equivalent to a delivery of the goods to the consignee, before he can warehouse them.

This action was brought to recover damages for the delay in the delivery of thirteen bales of cotton, alleged to have been occasioned by the negligence of defendant as a common carrier. It appeared that the cotton was shipped from C. consigned to "Byron Sherman, 41 Mercer street, New York," each bale being marked with the letters "F. B.," and these marks and the direction to the consignee were upon the shipping bill forwarded by mail to plaintiffs. The cotton

reached Albany by the New York Central Railroad, and was delivered with a freight bill by its agents to defendant, to be transported to New York. The freight bill contained the back charges on the cotton, the number of bales and the marks thereon, and named the consignee "Byron Sherman;" this was all the information received by the defendant. The cotton was immediately transported to New York, arriving there December 14, 1864. Defendant changed the name of the consignee to "Ryan & Sherman," and entered it and made out its bills in that name. Not finding the supposed consignees, defendant kept the cotton until December 21st, and then stored it, and plaintiffs did not receive it until February 6th, 1865, there having been in the meantime, a large decline in the price of cotton. It appeared that Byron Sherman called about the time of the arrival of the cotton and several times afterwards at the defendant's general freight office, having with him the bills of lading which he exhibited to defendant's agents, in charge of the office, and inquired for the cotton, but could obtain no information concerning it. The referee did not expressly find as matters of fact that defendant had been guilty of negligence, but among his conclusions of law, found that defendant was guilty of negligence.

Henry N. Beach, for respt.

Samuel Hand, for applt.

Held, That the finding of negligence by referee was sufficient, that a finding of negligence is generally an inference from many facts, and when found in the referee's report must be deemed his inference from all the evidence. That the evidence warranted the referee in finding that the delay in the delivery of the cotton was caused by defendant's own negligence in changing the name of the consignee to "Ryan & Sherman."

A common carrier is bound to transport goods committed to him, in a reasonable time, and if he fails to do this

from mere negligence, or a plain violation of duty and their market value falls in the meantime, the true rule of damages is the difference in the value of the goods at the time and place they should have been delivered and the time of their actual delivery. 47 N. Y., 29; 49 id, 442. He has not performed his contract as carrier until he has delivered, or offered to deliver, the goods to the consignee, or done what the law esteems equivalent to a delivery. If the consignee is unknown to the carrier, a due effort to find him and give notice of the arrival of the goods, is a condition precedent to the right to warehouse them, and if a reasonable and diligent effort is not made the carrier is liable for the consequences.

Judgment of General Term affirming judgment for plaintiffs on report of referee, affirmed.

Opinion by *Earl, J.*

SEDUCTION.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Certwell, applt., v. Hoyt, resp.
Decided January, 1876.

A grandfather, who took his grandchild in her infancy, and adopted and supported her until she was fifteen, when she left his house, and supported herself, may maintain an action for her seduction.

This is an action of seduction. The plaintiff is the grandfather of the girl seduced. The father and mother of the girl died when she was a mere infant, and the mother, before her death, requested the grandfather to, and he did afterward, take and support the girl in his family, up to the time she became fifteen years of age. She then went out to service, enjoyed her own wages, and when out of employment, would stay at the house of plaintiff, and made his house her home. The girl was 18 when the alleged seduc-

tion occurred, and at the time she was in the employ of the defendant.

On the trial plaintiff was non-suited, on the ground that as grandfather he could not maintain the action.

Hubbard & Watts for resp.

N. Whiting for applt.

Held, That the grandfather could maintain this action; that he stood "*in loco parentis*" to the infant, and the fact that she had left his house and was supporting herself, did not change his right to maintain the action; that plaintiff, by his adoption of the infant, and supporting her, became practically her parent; that by reason, also, of plaintiff's taking care of the girl during her confinement, in performance of the duties he had assumed, and by reason of expenses incurred, he had a ground for action against defendant. Judgment reversed.

Opinion by *Mullin, P. J.*

Smith, J., concurs in result on ground that the request of the girl's mother, that plaintiff would take and care for her, which he did, invested in plaintiff all the rights of a parent.

REAL ESTATE. BROKER'S COMMISSION.

CITY COURT OF BROOKLYN—GENERAL TERM.

Hoyt, et al., respts., v. Howe, applt.

A party employing broker to sell or exchange property, is entitled to his disinterested efforts and judgment.

If brokers, while so employed, bring to him a purchaser, by whom they are also employed, without disclosing such fact to former employer, it would be such a fraud as would prevent his recovering any compensation.

Appeal from judgment entered upon the report of a referee.

The plaintiffs are real estate brokers, and as such, had placed in their hands by defendant, in December, 1871, a farm for sale or exchange. They thereafter had entrusted to them by one *Lauder*, certain

houses for sale or exchange. Of this defendant had no knowledge. They thereupon sought to effect an exchange between defendant and Lauder, and for that purpose brought about a meeting of the two. Defendant was at first unwilling to make the exchange, but on plaintiffs' representation that the houses were really more valuable than defendant supposed, and on his advice that he had better take them, defendant agreed to the exchange, and signed with Lauder the contract of exchange. It was about this time agreed between plaintiff and defendant, that plaintiffs' commission should be \$500. When they came to arrange the details, it was found that the title to two of the houses was in the name of one McKesson, who, however, expressed a willingness to execute a deed to defendant, and that there was a small mortgage upon the same, which Lauder was seeking to remove. Defendant, at this point, broke off negotiations, and refused to pay plaintiffs their commission. The case was referred to George H. Halsey to hear and determine, who reported in favor of plaintiffs.

S. S. & D. J. Noyes for respts.

Smith & Woodward for applt.

On appeal, *Held*, That the mere failure to perfect the exchange would not relieve defendant from paying plaintiffs' commission, inasmuch as they had found for him a party who was ready and willing to effect the exchange on his terms.

The fact that plaintiff acted for both parties, without the knowledge or consent of the defendant, raises a different question.

The Court of Appeals, in the case of *Carman v. Beach* (not yet reported) held that the party employing a broker is entitled to his disinterested efforts and judgment, and if the broker brings to him a purchaser for whom also he is acting as agent, without disclosing the fact to his former employer, it would constitute such a fraud as would preclude him from recovering any compensation.

Plaintiffs were, in the case before us, as much the agents of the one as of the other, and they were not the agents of defendant exclusively, and yet they failed to apprise defendant that the property which they were offering him in exchange was in their hands already for sale, as brokers.

Judgment reversed, and order of referee vacated.

Opinion by *McCue, J.*; *Neilson, Ch. J.*, concurring.

RELIGIOUS CORPORATIONS.

WHEN TITLE VESTS.

N. Y. COURT OF APPEALS.

The Alexander Presbyterian Church *applt. v. Presbyterian Church cor.* Fifth Avenue and 19th street, New York, *respt.*

Decided February 22, 1876.

Under section 4 of the Act of 1813, providing for the incorporation of religious societies, it must appear that the property was given or granted to the societies or for its use, or no title will vest; if, from the nature of the societies holding it is apparent that the owner of the fee did not so intend, no title passes.

This action was brought to establish title of plaintiff in and to a building which had been built for a mission school and chapel, and to enjoin the defendant from interfering with its possession of the premises. It appeared that the parties were religious corporations organized under the act to provide for the incorporation of religious societies, passed April 3, 1813, (3 Edms. Stat., 691).

The real estate in question was purchased and the church erected from funds contributed by members of defendant's corporation for the purpose of establishing and maintaining a mission church under the provisions of chap. 122, laws of 1850, and it was so used and occupied. Subsequently the members attending and connected with such mission-church organized plaintiff's corporation. This was

done with defendant's consent, and the premises were leased to the new organization from year to year at a nominal rent. It claimed title under Section 4 of said act first mentioned, which provides that the trustees of every church, organized under the act, may take into their possession and custody, all the temporalities real or personal, belonging to such church, whether they have been given, granted, or devised directly to such church or to any other person for its use, and to receive, hold and enjoy all churches and estates belonging to such church in whatsoever manner the same may have been organized or in what name held, as fully and amply as if the right and title thereto had been originally vested in said trustees.

Chas. P. Shaw, for applt.

S. P. Nash, for resp't.

Held. That the action could not be maintained; that in order to bring a case within §4 of the act of 1813 it must appear the property has been given or granted to the society or for its use, and here the property was purchased for defendant's use, not plaintiff's.

The fact that defendant consented to the incorporation of plaintiff did not divest it of the property and vest it in plaintiff; it could consent upon such terms as it saw fit, and the fact that defendant retained possession and control of the property, leasing it to plaintiff, showed that it did not intend to vest it in plaintiff.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Per Curiam opinion.

EXECUTORS. GIFT. MONUMENT.

THE ORPHANS' COURT—PHILADELPHIA.

Estate of Andrew C. Barclay, deceased.

Decided March 18, 1876.

An executor will not be surcharged, as respects legatees and next of kin, with the cost of a monument over his testator which is reasonable, accords with the means and position of

the testator, and has been approved by the majority of said legatees and next of kin.

But the cost of improvement and inclosure of burial lot will not be allowed an executor as respects objecting parties in interest.

A delivery by testator to his executor of certain money to be distributed among his servants, which was so distributed after his death, constitutes valid donationes causa mortis.

Where an executor is likewise trustee he is allowed but one commission for both capacities.

Sur exceptions to auditor's report.

In addition to the usual funeral expenses the executors erected a marble monument over the grave of testator, at a cost of \$1929, and enclosed the cemetery lot with curbing, at a further expense of \$2,400. There were no creditors, but these expenditures were objected to on behalf of certain of the children of testator, legatees under his will. The estate was estimated at \$360,000. The auditor allowed the credit claimed for the cost of the monument, but for the reasons that the improvement of the burial lot formed no part of the funeral expenses, but was upon the same footing as improvements to the other real estate, and had been made without the unanimous consent of the parties interested, he surcharged the executors with one-third of the cost, such proportion representing the shares of the children who objected to the expenditure. This conclusion of the auditor was excepted to by both the legatees and the executors. The former except to any allowance for the cost of the monument.

It was also claimed to surcharge the executors with \$1100, given to one of their number by testator, to distribute among his servants after his death.

During his last illness, and but a few days before his death, testator stated to one of his sons, and also to a friend whom he had selected as one of the executors of his will, that he had neglected to provide

for his servants, and he wished \$1100 to be drawn out of bank and distributed among them as he directed. Arrangements were made by which the money was obtained from the bank and given to one of the executors, who then said aloud to testator, in the presence of members of his family, "this eleven hundred dollars is given to me for your servants," to which the testator assented. The executor notified certain of the servants of the gifts to them, but delayed payment until after the death of testator, in the belief that the delay would insure more careful attendance upon him during his sickness. Shortly after the disease the gifts were paid.

The sixth, seventh and ninth exceptions are to the rate of commissions allowed the accountants. They are both executors and trustees.

Held, 1. That the cost of the monument, in view of the testator's circumstances, was properly allowed.

2. That the executors had no right to improve the burial lot, and were correctly surcharged with the cost.

3. That the executors held the money for the servants, and that the gifts were good as *donationes causa mortis*.

4. That by the act of March 17, 1834, Purdon 445, p. 197, the executors being also trustees, are entitled to but one commission.

Opinion by *Hanna, J.*

ARBITRATORS. AWARD.

CONNECTICUT SUPREME COURT OF ERRORS.

John Gaffy v. The Hartford Bridge Company.

Decided February, 1875.

Where a submission to arbitration provided that each party should choose one referee, and in case they did not agree the two referees to choose a third one, the third referee is a joint arbitrator and not an umpire.

It is the duty of an umpire to give notice to the parties and hear their evidence unless there is an express provision to the contrary in the submission or the parties have so agreed.

Motion in Error to Common Pleas of Hartford County.

This action is assumpsit on a submission and award. The submission was in writing, referring the matter in dispute to two referees, with power, in case of disagreement, to appoint a third. They heard the parties in March, 1873, and did not agree upon an award. In February, 1874, they appointed a third person, who, without notice to the defendants, and without their knowledge, after conferring with the other arbitrators, published an award as sole arbitrator. The court of Common Pleas rendered judgment for the defendants, and the plaintiff brings the record before this court by a motion in error.

Held, 1. We are clearly of the opinion that the third person was not an umpire, but a joint arbitrator.

2. That if he were an umpire it was his duty to give notice to the parties and hear their evidence before the publication of his award.

Opinion by *Carpenter, J.*

CONTRACT.

N. Y. SUPREME COURT, GENERAL TERM. FOURTH DEPARTMENT.

Booth, applt., v. The Cleveland Rolling Mill Company, respt.

Decided January, 1876.

Where, by the terms of a contract, a duty, though not by express covenant, is imposed on one of the parties to perform, and the other party has an interest in its performance, the law will imply a promise by the party to perform, and will sustain an action by the injured party to obtain compensation for a breach of it.

Where a contract provides one of two

ways of ascertaining the value of certain property, one of them must be resorted to before an action for the value can be maintained.

The plaintiffs were the owners of a patent for the manufacture of a rail for use on railroads, known as Booth's Patent Duplex Safety Steel and Iron Rail, and in June, 1869, they entered into an agreement, in writing, with defendants, in and by which plaintiffs agreed to give to the defendant full license to manufacture said rail in certain states, such license to continue during the running of said patent, and of all renewals thereof, and of all improvements upon such patent, and to all patents on the machinery for the manufacture, &c., such license to be exclusive in such states, and to continue so long as defendants should supply the demand for such rails in such states; all rails to be of good material and made in a good workmanlike manner; plaintiff to have the right to inspect all rails before delivery to purchasers.

And the conditions were:

1. Defendant was to pay a royalty of \$2.50 per ton on first 7,000 tons manufactured.
2. Plaintiff to have notice and inspect sales.
3. Royalty on defective rails to be one-half.
4. Defendants to keep true accounts, to be open at all times to plaintiff's inspection.

It was further agreed that plaintiff should send to defendants, at Cleveland, all such machinery, tools, &c., then in his possession at Rochester, for the manufacture of said rails, the value thereof to be agreed on between the parties if they could agree, and if they could not agree, then arbitrators were to be appointed. Ownership of the machinery to be in plaintiff until defendants should have made 7,000 tons of rails, and then to belong to defendants, and to be paid for by them.

Defendants to proceed at once to make rails, and give as much attention to them as to any other rails manufactured by them.

On the same day the last mentioned contract was made, another was also entered into, in which it was recited that plaintiff did thereby sell and grant unto the defendants the right, license, and privilege to manufacture said rails in the states in said former contract mentioned, paying the royalty aforesaid.

The breaches of the contract for which plaintiff seeks to recover in this action are:

That rails were not made in good, workmanlike manner; proper efforts to introduce and sell them were not made; they have neglected to fill orders, &c., on which plaintiff would have received large royalties; they have not paid for the machinery sent by plaintiffs to them, pursuant to said contract, although they have made 3,000 tons of rails, and have received orders for enough more to make up 7,000 tons, when, by the terms of the contract, they were bound to pay for said machinery.

On the trial it was proved that defendants did manufacture some of the rails, and that they had made large contracts with different railroads to manufacture more, and that such contracts were not filled, and if filled were filled by other rails, and generally that defendants had by their course tended to injure plaintiff's rails.

The plaintiff was non-suited on the ground that there was no covenant to manufacture rails in the contracts.

J. B. Perkins for applt.

George F. Danforth for resp't.

Held, That the contracts between the parties were not a mere license to make and vend the Booth rails, which plaintiff could make at any time, and on which no action could be maintained against defendant for a breach of the conditions

thereof. The contracts show that the intention of the parties was different. The plaintiff relinquished the manufacture of the rail, and transferred not only the right to manufacture them to the defendants, but also the machinery they had used in manufacturing them, and in return they received so much as royalty.

That it is not necessary, in order to render a party liable upon a contract, that it should contain an express agreement on his behalf, if by the relations of the parties, and the subject matter of the contract, a duty is owing from the one not expressly bound by the contract to the other, in reference to the subject of it.

That the law implies a promise by the defendant to perform all the conditions, in the performance of which the plaintiff has a pecuniary interest, except that which relates to the payment of the price of the machinery. That defendant's liability to pay for the machinery depended upon two conditions: One is the making of 7,000 tons of Booth rails, and the ascertainment of the price by mutual agreement or by arbitration.

Either party could terminate the contract at pleasure, but the defendants, in order to relieve themselves, were bound to give notice of their determination, and return to plaintiff the machinery. They could not keep silent and omit to make the rails, return the machinery, and deprive plaintiffs of the royalty to which they would have been entitled had the defendants, in good faith, performed the contract.

That the plaintiffs cannot recover the price of the machinery in this action, or until the price is ascertained in one of the ways provided in that contract.

Non-suit set aside and new trial granted.

Opinion by *Mullin, P. J.*

DISCONTINUANCE.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Julius Hilborne, as assignee, &c., *respt.*
v. Christian Kolle, et al, *appls.*

This court has power in its discretion to allow the discontinuance of an action without costs.

Appeal from an order allowing the plaintiff to discontinue without costs.

The plaintiff in this cause is an assignee in bankruptcy. He had previously brought a suit in the U. S. Circuit Court to recover certain property alleged to belong to the bankrupt which was in the name of bankrupt's wife. In the progress of that suit there was a reference to a commissioner, who proceeded to take testimony. There were other proceedings against the bankrupt in which testimony had been taken before the same commissioner.

In the suit in the U. S. Circuit Court between the same parties as in this suit, a stipulation was entered into between the respective counsel. It was agreed that on the final hearing thereof either party might read any part of the whole of the evidence taken before the commissioner on the reference to him, in another case of Hilborne, assignee, v. Obenier, et al, subject, however, to objections and exceptions the same as if regularly taken in the suit in the U. S. Court between the same parties as in this suit, but without prejudice to the right of the parties to call witnesses already examined or other witnesses.

Subsequently another stipulation was entered into in the suit in the U. S. Circuit Court, between the same parties as in this suit, whereby it was agreed that the complainant should institute an action in the Supreme Court against the defendants, for the same cause of action, in lieu of the U. S. Circuit suit, and that the pleadings should be the pleadings of the action in the Supreme Court, and the same should be referred to a referee, and that the evidence and exhibits which were to be read and submitted on the final hearing of the cause between these same parties in the U. S. Circuit Court suit,

should be read and submitted to the referee in this suit, in the same manner, and subject to like objections and exceptions, and that the referee make his report upon such evidence and exhibits, and none others.

Upon the hearing before the referee in this suit, certain evidence, alleged to be material, was offered and objected to on the ground it was not within the terms of this stipulation, plaintiff supposing that he could introduce any evidence taken before the commissioner in any of the suits wherein he took testimony. Plaintiff then made a motion to have the stipulation modified to allow the introduction of the evidence sought to be introduced in this suit, or that the action be discontinued without costs.

An order was entered discontinuing this action without costs, from which order this appeal was taken.

R. S. Newcomb, for resp't.
D. & S. Riddle for appl't.

Held, That the action was of an equitable nature, and costs were within the discretion of the court, and sufficient reason existed for the exercise of that discretion.

Barante v. Deyermant, 41 N. Y., 335.

The order was broader, perhaps, than the situation of the parties required, for the difficulty found to have been produced might be removed by a modification of the terms of the stipulation. Stipulation should be so far modified as to allow the plaintiff to discontinue without costs, unless the defendant will stipulate within twenty days after notice of this decision, that the plaintiff may, upon the trial of this action, read all the evidence taken in the different proceedings had in the United States Court. In that event the motion for leave to discontinue should be denied, otherwise affirmed.

Opinion by *Daniels, J.*; *Brady, J.* concurring. *Brady, J.*, wrote opinion with same result.

CONVERSION.

CITY COURT OF BROOKLYN, GENERAL TERM.

Corsan, resp't., v. *Oliver, appl't.*

An action for conversion will lie against one who has unlawfully parted with the possession of another's property. In such case he is regarded, to all intents and purposes, as still in possession, sufficiently so to render him liable in replevin or trover.

Appeal from judgment entered on a verdict.

One Hughes, in August, 1868, hired of defendant a store in Brooklyn, took possession and put in certain fixtures for business purposes. The lease under which he held in the 7th clause, contained the usual provisions, as to renting and re-letting in case the premises were deserted.

In December, 1868, the sheriff took possession of the store and Hughes's goods, by virtue of executions against Hughes, under which the goods were sold, the fixtures, however, remaining in the store. About January, 8, 1869, the sheriff removed from the premises which remained unoccupied until February, 1869, when defendant re-let them to one Fleming, leaving the fixtures in the store, but not including them, in terms, in the lease.

In March, Hughes assigned the fixtures to plaintiff, who demanded the same of defendant, but was refused—defendant asserting a prior claim to them, on account of arrearage in rent.

A second demand was made by plaintiff's attorney, who was answered by defendant, that he had rented them with the premises.

It was urged by defendant that this action could not lie, in that the conversion occurred, if at all, before plaintiff had title to the fixtures, and to recover, he must show a conversion as to himself, after he became owner; and he must

show that defendant had control of the fixtures and could have complied with the demand when made.

Verdict for plaintiff.

Hedley & Parsons for respt.

Stereing & Walden, for applt.

On appeal, *Held*, That the lease by defendant to Fleming, did not include the fixtures in terms, and there is room to doubt that defendant really intended to put them out of his control, in case, at any time, it should become his interest to resume that control.

Assuming, however, that defendant was out of possession, we do not think that fact would be a bar to this action.

It is well settled that an action will lie in favor of the true owner, against a person who has parted with, and at the commencement of the action, is not in law or fact in possession of, the property (38 N. Y., 475; 23 N. Y., 264; 27 How, Pr., 420). When the defendant has unlawfully parted with the property sought to be recovered, he is to all intents and purposes, to be regarded as still in possession, sufficiently to render him liable either in replevin or trover.

Actual forcible dispossession of plaintiff need not be shown.

Judgment affirmed.

Opinion by *McCue, J.*

GRAND LARCENY.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Wolfstein, plttf in error, v. The People, defts in error.

If a person is overpaid by mistake, and at the time of discovering the error, whether that be at the moment of payment, or afterwards, forms the intention of defrauding the rightful owner as to such overpayment, it is larceny.

Writ of Error to the General Sessions.
Prisoner was indicted for grand larceny.

ny. He was the possessor of a draft, drawn to his order on certain bankers in New York, for \$74 in gold. The draft was accepted payable at Germania American Bank, and endorsed by the acceptors.

The draft was duly presented at the Germania American Bank.

The teller not being able to read the body of the draft, it being in French, looked to the figures, which were 74, and an irregular mark much like the letter z, (intended to prevent any addition to, or alteration of the amount). He mistook it for 742, and paid the prisoner \$742 in gold coin, who received the same without comment, and went off.

This mistake being detected, prisoner was arrested. He denied having received more than \$74.

Verdict of guilty.

Chas. W. Brooke, for plttf. in error.

B. K. Phelps, for deft. in error.

On appeal, *Held*, That if the prisoner found on counting the money, that he had in his possession that to which he knew he was not entitled, and which he knew the owner did not intend to give him, he was bound to return it, and if he did not, but concealed its possession, and sought to deprive the owner of it, and if this error was discovered at the bank, when the money was delivered, and he took it with the intent to defraud the owner, the crime was then complete.

But if the error was not noticed until afterward, and if the intent of felonious appropriation was then formed and executed, the legal guilt of the prisoner was at that time incurred. It will not do to say, that because the owner parted voluntarily with his property, therefore there was no unlawful taking, there may be the physical act, but there is absent the intelligent assent to the transfer, upon which consent must necessarily depend. The original taking even may have been lawful, but the legal accountability as for crime began when the error was discov-

ered and the intent formed to wrongfully and feloniously deprive the owner of his property.

Conviction affirmed.

Opinion by *Westbrook, J.*; *Davis, P. J.* and *Daniels, J.*, concurring.

DAMAGES. TOWN OFFICERS. VARIANCE.

U. S. SUPREME COURT.

Robert Dow, *plff. in error*, v. David Humbert et al., *defts. in error*.

Decided January, 1876.

In an action against town supervisors for failure to place certain judgments upon the tax list as required by law, the damages in the absence of proof of actual, are limited to nominal damages; the supervisors do not become debtors for the full amount of the judgments.

Under an allegation of the recovery of a judgment in the Circuit Court for the District of Wisconsin, a judgment obtained in the Eastern District Court of Wisconsin is inadmissible, where the defendant has pleaded NUL TIEL.

In error to the Circuit Court of the United States for the Western District of Wisconsin.

The defendants are sued by plaintiff for a failure to perform their duty as Supervisors of the town of Waldwick, in the County of Iowa, Wisconsin, in refusing to place upon the tax list the amount of the judgments recovered by him against that town. By the statutes of Wisconsin, no execution can issue against towns on judgments rendered against them, but the amounts of such judgments are to be placed, by order of the supervisors, on the next tax list for the annual assessment and collection of taxes, and the amount so levied and collected is to be paid to the judgment creditor, and to no other purpose.

The declaration avers due notice served on the supervisors of these judgments, and demand that they be so placed on the tax list. The first judgment is described

in the declaration as rendered in the Circuit Court for the District of Wisconsin, on the 27th October, 1870, for \$708.90; and the notice to the supervisors, set out in the declaration, uses the same language. The other judgment is described as rendered in the Circuit Court for the Western District of Wisconsin, June 10, 1871, for the sum of \$1,531.56.

The answer of the defendants denies that there is any such judgment as that first described. And as to the second judgment, they say that after it was rendered the town of Waldwick was divided and a part of it organized into the new town of Moscow; that thirty-seven per cent. of the judgment was collectible from that town, and that it was not the duty of the defendants to levy the whole judgment on the property of the citizens of Waldwick.

On these issues the parties went to trial before a jury. In support of the issue as to the existence of the first judgment, plaintiffs introduced a copy of a record of a judgment between the same parties, for the same amount, and of the same date as that described in the declaration, in the Circuit Court for the Eastern District of Wisconsin, to which defendants objected because it varied from the judgment described in the declaration, and in the notice given to the defendants to place it on the tax list. The court sustained the objection. There had been for many years a Circuit Court for the District of Wisconsin. Shortly before this judgment was rendered the district was divided into two districts, and the circuit courts were by the expressed language of the act of Congress called the circuit court for the eastern district and the circuit court for the western district respectively.

Plaintiff introduced a record of his judgment for \$1,531.56 in the western district of Wisconsin, and notice and demand as to that to the supervisors.

This being all the testimony, plaintiff requested the court to charge the jury

that the plaintiff was entitled to recover of the defendants the amount of both these judgments with interest from their date; and this being refused, he asked the same instruction as to the second judgment, which was refused. Exceptions were taken to both these refusals, and to the following language in the charge which the court did deliver:

"The jury are instructed upon the whole evidence in the case, that the plaintiff is entitled to recover nominal damages from the defendants by reason of their failure to direct the levy of the tax in question. The plaintiff is not entitled to recover any more, because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment on the next tax roll of the town."

Held, That by their simple failure to place the judgments on the tax list, defendants did not become debtors to the amounts; that in the absence of proof it must be presumed that the taxable property of Walduick township remains today as it was when the levy should have been made; that a levy this year would as surely produce the money as if it had been made last year; the debt is not lost, and that plaintiff was limited, there being no proof of actual damages, to a recovery of nominal damages and costs.

2. That the first judgment was properly excluded.

Judgment affirmed.

Opinion by *Miller, J.; Clifford, J.*, dissenting.

TRUSTEE.

N. Y. COURT OF APPEALS.

Graves, resp't., v. Waterman, Admr., &c., et al., appl'ts.

Decided January 18, 1876.

A trustee may purchase from the cestui que trust, under circumstances amounting to a fair and distinct dis-

solution of the trust at the time of the purchase.

This Court will not examine the testimony with a view of ascertaining the merits where the case was disposed of below upon an erroneous idea of the law.

It is error for the General Term on reversing a judgment, to direct judgment absolute unless it clearly appears that no evidence, upon a new trial, could change the result.

This action was brought by the surviving executor of C. R., deceased, to determine which of the two defendants is entitled to a residuary share in this estate.

By the will of C. R., after the gift of certain specific legacies, so much of the estate as would produce \$600 per annum for the widow during her life, was set apart for her use. At her death, this was to be divided equally among his heirs. All the residue of the estate was to be divided equally among the testator's children, when the youngest living child arrived at the age of twenty-five. E. C. R. was one of the children, and when he became of age received his specific legacy under the will, and went into business, and became insolvent. Afterward he returned to the house of his mother, who was an executrix of C. R., and she furnished him with board and clothes and necessary spending money while there, and while in New York attending medicinal lectures from her own funds. After his return from attending said lectures, E. C. R. executed, at his mother's request, under hand and seal, a writing assigning to her all the right, title and interest, which he had as heir at law, devisee or legatee of C. R. The consideration expressed was one dollar and the aid and assistance furnished him by her. The instrument was duly acknowledged and delivered, and recorded in the Clerk's office. His mother continued after that to furnish him with board, &c. When the assignment was made, E. C. R. was indebted to various persons.

The defendants in this action were the administrators of the widow, and the administratrix of E. C. R.

The referee found that the administratrix was entitled to the fund; that the purchase of the interest of E. C. R. by the widow, she being at the time executrix and trustee of C. R., was void, as any purchase of a trust estate, or any portion of it to a trustee was illegal.

H. Sturges, for resp't.

Samuel A. Bowen, for appl'ts.

Held, error. That the rule, that a trustee, or one who, having been employed or concerned in the affairs of another, has acquired a knowledge of his property is incapable of purchasing such property himself, does not mean as an absolute invariable rule that he cannot buy from the *cestui que trust*, who is *sui juris*. 20 Atk., 58; 12 Ves. jr., 555; 2 J. Ch. 252-8.

A trustee may purchase from the *cestui que trust*, under circumstances amounting to a fair and distinct dissolution of the trust connection at the time of the purchase. The contract must be distinct and clear, and it must be apparent that it was the intent of the *cestui que trust* that the trustee should buy and that there was no fraud, concealment or advantage taken by the trustee, of information acquired in the character of trustee. 3 Myl. & K., 113-135.

Also held, That the case having been disposed of upon an erroneous idea of the law, this court would not look into the testimony to see whether the circumstances brought the case within the safeguards against an improper dealing by a trustee with the trust estate.

But held that the case was not so clearly made out for sustaining the validity of the assignment, as that it could be said evidence upon a new trial would not change it, and that therefore a judgment absolute for the administrators was er-

The judgment of General Term, so far as it refused judgment below, affirmed; so far as it decided judgment absolute against defendants, with costs, reversed and new trial granted.

Opinion by *Folger, J.*

TRESPASS. CONTAGIOUS DISEASE.

SUPREME COURT OF ERRORS OF CONNECTICUT.

Beckwith, et al., v. Sturtevant.

A person has no right to place a family infected with small-pox in an unoccupied dwelling house belonging to another, without the consent of the owner, or authority from the board of health of the town, although such removal of the family may be necessary to prevent the spread of the disease.

Trespass *qu. cl. fr.*, brought to the Superior Court in New London County.

On the trial the plaintiffs offered evidence to prove that on the 4th day of January, 1872, and ever since, they had been the owners of the land described in the declaration, upon which there was an unoccupied dwelling house, and that on said 4th day of January the defendant, without the license or knowledge of the plaintiffs, or any of them, took forcible possession of the dwelling house, effecting an entrance by breaking in the front door with an axe, and shortly after, on the same day, placed therein a certain German family, one of whose members was sick with the small-pox; and that the family continued in the occupancy of the house until the 19th day of February following, when it was destroyed by fire. How the fire originated was not disclosed by the evidence.

The defendant did not deny that he broke and entered the house, as claimed by the plaintiffs, but offered evidence to prove that at the time a member of the family in question, which was then in the

occupancy of a tenement house belonging to the defendant, upon the factory grounds of the Niantic Woolen Company, and in a comparatively thickly settled neighborhood, was sick with the small pox, and that there was danger that the disease would spread if the person thus affected should be permitted to remain where she then was, and that he entered and took possession of the plaintiffs' house for the purpose of placing the family therein, and for no other purpose.

The defendant further offered evidence to prove that he acted under the direction of one Richard W. Lee, a selectman of the town of East Lyme, and who was also president of the board of health of the town. He also offered evidence to prove that the destruction of the building by fire was not owing to any acts or neglect of his own, or of the family so by him placed in the house. There was no hospital in the town at the time.

The defendant requested the court to charge the jury that if they should find that the removal of the family from the dwelling house which they were occupying to the house of the plaintiffs, was necessary to prevent the spread of the small pox; or, if the removal was made in pursuance of an order of the board of health, or of a health officer of the town of East Lyme, for the purpose of preventing the spread of the disease, the verdict should be in his favor, unless the jury should further find that the house was destroyed by his act or neglect.

The court charged the jury that the acts of the defendant were a trespass, for which he was liable in damages to the plaintiffs to the extent they had suffered by reason of such acts, unless he was justified on one or other of the grounds set up in his plea and notice. As to the first portion of the defendant's request, the court charged them that the defendant had no individual right, without the license or permission of the plaintiffs, to enter and take possession of their house,

and to place the family therein, even though the jury should find that to prevent the spread of the small pox such removal of the family was necessary. As to the second portion of the request, the court charged substantially as requested.

The jury returned a verdict in favor of the plaintiffs for the sum of \$480 damages and their costs; and the defendant moved for a new trial for error in the charge of the court.

Held, The instruction given was clearly correct. The statute has made all reasonable and practicable provision to prevent the spreading of such diseases, consistent with the right of domicile and property.

New trial not advised.

Opinion by *Phelps, J.*

OFFICIAL CERTIFICATE. AGENT.

SUPREME COURT OF PENNSYLVANIA.

Houseman v. The Girard Mutual Building and Loan Association.

Decided March 13, 1876.

The Recorder of Deeds is liable in damages for losses suffered by a mortgagee by reason of a false certificate of mortgage search issued from the recorder's office. A principal is bound by the knowledge of his agent only so far as it was gained in the transaction in which he was employed. It is not prima facie negligence in a mortgagee or his conveyancer, to allow the proposed mortgagor to procure the necessary mortgage search.

Error to the District Court for the City and County of Philadelphia.

The action was in trespass on the case for damages alleged to have been suffered by the plaintiffs, by reason of the inaccuracy of certain certificates of search given by the defendant in his official capacity as Recorder of Deeds of Philadelphia.

In 1871, C. M. S. Leslie, a conveyancer of good standing, applied to the Girard Mutual Building and Loan Association (the plaintiff) for two loans of two thousand dollars and sixteen hundred dollars, to be respectively secured by mortgages,

which were duly executed upon premises belonging to Leslie.

It was testified by the association's conveyancer, that Leslie was in haste, and had offered to procure the searches for him, saying that he could get them more quickly out of the recorder's office, as he had more facilities. He was permitted to do so. The searches failed to show any prior mortgages, and were received and examined by the conveyancer before the money was paid Leslie.

Prior mortgages existed which rendered those in question valueless.

The court below instructed the jury as follows:

"If the jury believe the evidence of the plaintiff, there is negligence in law, and the damages are the total amounts loaned on the said mortgages and interest, less such sums as Leslie may have paid on account," reserving the following points for the decision of the court.

1. Is there evidence of negligence?
2. Leslie having been the agent to procure the searches, does the knowledge by him of the fact of the prior mortgages estop the plaintiffs from alleging that the defendant was negligent, or that he made a false certificate?

These questions reserved were decided in favor of the plaintiff, and judgment rendered thereon.

Held, 1, The Recorder was liable for the damages caused by the false certificate.

2. That the knowledge by Leslie of the prior mortgages did not affect the plaintiff, inasmuch as it was not acquired in the course of the business in which he was employed. This rule does not depend upon the reason that no man can be supposed to always carry in his mind a recollection of former accuracy; the true reason is a technical one—that it is only during the agency that the agent represents and stands in the shoes of the principal.

3. It was not negligent to allow the

applicant for the loan to procure the searches.

Judgment affirmed.

Opinion by *Sharswood, J.*

PRACTICE. TESTIMONY IN EQUITY CASES.

U. S. SUPREME COURT.

Henry H. Blease, *applt.*, v. Albert C. Garlington.

Decided January, 1876.

Circuit Courts are not required to hear oral testimony in equity cases, but if they do it must be reduced to writing and sent here as part of the record, and must include testimony objected to and ruled out, subject to the objection. This court will not send the case back to have the rejected testimony taken.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This suit was brought for the foreclosure of a mortgage made by Blease to Garlington. The bill is in the ordinary form. Blease, in his answer, admits the execution of the note and mortgage, but insists, by way of defence, that Garlington deceived him as to the value of the consideration of the said note and mortgage and has not complied with his positive agreement.

Upon the hearing in the court below, after the plaintiff had submitted his case upon the pleadings and his mortgage, the defendant presented himself as a witness to be examined orally in open court, and proposed to testify to certain facts.

His proposition made in writing is sent here as part of the record. The court refused to receive the testimony, and it was not taken. A decree having been entered in favor of Garlington, Blease brings the case here by appeal.

Held, That Circuit Courts are not by law required to permit the examination of

witnesses orally in open court upon the hearing of equity cases, and that if such practice is adopted in any case, the testimony presented in that form must be taken down or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might on examination be of the opinion that the objection ought not to have been sustained.

The act of 1872 (17 Stat. 197; Rev. Stat., sec. 914) providing that the practice, pleadings, and forms, and modes of proceeding in civil causes in the Circuit and District Courts shall conform, as near as may be, to the practice, &c., of the Courts of the States, has no application to this case, because it is in equity, and equity and admiralty causes are in express terms excepted from the operation of that act.

Decree affirmed.

Opinion by *Wait, C. J.*

NEGOTIABLE PAPER. PAYMENT IN ABSENCE OF NOTE.

SUPREME COURT OF TENNESSEE.

Gosling v. Griffin.

Decided November 27, 1875.

Payments of negotiable paper before it is due, and in the absence of such paper, are not made in due course of business, and the party so paying should be held to do so at his own risk. Therefore, the maker of negotiable paper is not discharged, if before the maturity of the paper, and after its transfer, even as collateral security, he makes payment to any person other than the real holder.

On the 9th day of January, 1871, the defendant, T. S. Griffin, executed and delivered to Pollard & Co., his negotiable

promissory note for the sum of \$598.00, payable thirty days after date, the consideration for said note being the proceeds of a buggy which Pollard & Co. had placed in said Griffin's hands for sale, and which he had sold, and used and appropriated the money. The payees in said note being indebted to the plaintiff Gosling in the sum of \$554.25, evidenced by their acceptance, which matured 1st and 3d of January, 1871, and which had been placed in the hands of attorneys at Memphis for collection, on the 10th day of January, 1871, indorsed in blank the defendant's said note for \$598.00, and delivered it to the plaintiff's attorney as collateral security for the indorser's acceptance, which said attorneys held for collection. Said attorneys, at the time of receiving defendant's note from said Pollard & Co., gave to the latter a receipt specifying that said note was received by them as collateral security for the payment of said Pollard & Co.'s acceptance for \$554.25, due 1st and 3d of January, 1871. It appears that the defendant, after the date of this transfer, and before the maturity of his said note, delivered to Pollard & Co. several lots of flour and meal in payment and satisfaction of his note. This flour and meal, to the amount of \$613.00, was delivered on the 26th and 29th of January, 1871, without notice or knowledge on the part of defendant that this note had been previously endorsed and transferred by Pollard & Co. to the plaintiff. He accordingly refused to pay the note at its maturity, and was sued thereon by the plaintiff in the First Circuit Court of Shelby county.

Amongst other pleas not necessary to be noticed, the defendants plead that said note was not transferred to the plaintiff in due course of trade, but was given to the plaintiff by the firm of Pollard & Co. as collateral security for a debt which the said Pollard & Co. owed the plaintiff, and further, that the defendant paid said note to the firm of Pollard & Co., without notice from the plaintiff that he had the note

assigned to him, and of this he put himself upon the country. By consent of parties a jury was waived, and the case was tried by the court, and resulted in a finding "that, though the note was assigned before maturity, it being received as collateral to secure a pre-existing debt, the defendant should have been notified of the assignment, and the plaintiff cannot recover on the note, because defendant was not so notified (before paying the note to Pollard & Co). The court thereupon gave judgment for the defendant, from which the plaintiff has appealed in error to this court.

Held, That the principle laid down by the court below in effect places negotiable paper upon the same footing as open accounts, and attaches a condition to the legal and complete transfer thereof, which cannot be supported either upon principle or authority.

When the title has passed by endorsement and delivery, even as collateral security, the actual or legal holder alone has the right to receive the money due thereon, and if the maker pays to the original payee after such transfer, in the absence of the paper, either before or after its maturity, such payment is not made in the due course of business, and the party paying must be held to do so at his own risk.

The case of *Vatterlien v. Howell*, 5 Sneed., 441, was incorrectly decided, and should not be adhered to as an authority.

Judgment reversed, and judgment for plaintiff, with costs.

Opinion by *Jackson, J.*

LEASE. ARMORY.

N. Y. COURT OF APPEALS.

Ford, applt., v. The Mayor, &c., of N. Y., resp.

Decided December 21, 1875.

A board of Supervisors have no power to enter into a lease of a building for armory and drill purposes, until

they have complied with all the requirements of section 120 of the Military Code of 1870.

The Military Code of 1862, is repealed by the Military Code of 1870, except as to certain legal proceedings.

This action was brought to recover rent claimed to be due upon a lease between the plaintiff and the Board of Supervisors of the County of New York, executed September 19th, 1872, for the term of ten years and seven months, by the clerk of the Board of Supervisors, pursuant to a resolution of that body, authorizing the lease to be taken for the purposes of armories and drill rooms, which resolution was based upon a report of a committee of the board, stating they had considered the subject of providing suitable armories for such portion of the militia as were in immediate want of the same, and that the Sixth Regiment must have an armory forthwith as the lease of the building it had occupied had been cancelled, and said regiment would be compelled to vacate, and that other portions of the militia had pressing need of new, or additional accommodation, and they recommended the leasing of plaintiff's premises, and on the same day the lease was executed. The Twelfth Regiment then occupied the premises under a lease for five years from May 1, 1870. In December, 1871, this lease was cancelled, and plaintiff's premises were assigned by the supervisors to the use of that regiment, which has occupied them ever since. The defendants claimed that the lease was void, because it was executed without authority.

W. H. Townley, for applt.

Wm. C. Whitney, for resp.

Held, That the plaintiff could not recover that the Board of Supervisors exercising simply a delegated authority, possess only such powers as have been conferred upon them by statute, or such as are necessary to the exercise of powers expressly given (6 Hill 244); that they had no power to make such a lease

until they had complied with all the requirements of § 120 of the Military Code of 1870, (Laws of 1870, Chap. 80); that the power conferred by said section is to be exercised in view of and in reference to a special exigency brought to the notice of the supervisors by a demand supported and accompanied by the certificates of proofs specified in said section.

It appeared that a demand had been made in 1862, by the companies of the Twelfth Regiment, upon the supervisors to be furnished with an armory, made pursuant to the Military Code of 1862, (Laws 1862, Chap. 177); and plaintiff claimed that this demand was sufficient. This demand had been complied with. The supervisors in making the lease, did not act upon the demand of 1862, and it did not appear the lease was made with any reference to the Twelfth Regiment.

Held, That this demand was not good; that the act of 1862, was repealed by the act of 1870, except only as to certain legal proceedings.

Also held, That the second section of chapter 758, Laws of 1873, authorizing payment of arrears of rent on certain leases, could not be construed as confirming the leases in question.

Judgment of General Term, reversing verdict at Circuit for plaintiff, affirmed.

Opinion by *Andrews, J.*

USURY.

N. Y. SUPREME COURT—GEN'L TERM.
FOURTH DEPT.

Bank of Monroe respt., v. Finley, applt
Decided January, 1876.

State Banks, when usury is taken, only forfeit the excess of interest.

The defense of usury is only a partial one.

This was an action on a note, and defendant set up a defence of usury. The plaintiff is a state bank. There was judgment for plaintiff at the Circuit.

W. F. Cogswell for respt.

Adams & Strong for applt.

Held, Usury is now only a partial defence to an action brought upon a promissory note, which had been discounted by a state bank. The interest only is forfeited. The recent judgment of the Supreme Court of the United States, in the *Farmers' and Mechanics' Bank of Buffalo v. Deering*, 1 N. Y. WEEKLY DIGEST, p. 289, has effectually exploded the doctrine of our Court of Appeals on this subject, and has established the principle that the usury laws of the States, so far as they apply to national banks, have been superseded by the Act of Congress which authorizes the creation of them. (U. S. Rev. Stat., Sec. 5197.) There is, therefore, no longer any reason for withholding the full operation of the act of our own Legislature, which provides, as a penalty for usury by State banks, the same consequence as that prescribed by the Act of Congress cited, namely, a forfeiture of the interest. (Laws 1870, Chap. 163.) This act, also, has put at rest a question often mooted, by declaring that the discount of a note, or other evidence of debt, payable at another place at not more than the rate of exchange, or a reasonable charge for collecting the same in addition to the interest, shall not constitute usury. There can be no doubt that this statute operates retractively, and takes away the previous penalty, for it repealed all acts and parts of acts inconsistent with it. No penalty can be enforced after the repeal of the law imposing it, unless saved by express words in the repealing act. (*Curtiss v. Leavitt*, 15 N. Y., 229; *Cooley Const. Lien*, 373-4.) Such being the effect of the act of 1870, there is no occasion to examine the evidence to see whether a case of usury under pre-existing laws was made out.

The judgment must be affirmed.

Opinion by *Gilbert, J.*

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BANKRUPTCY. ASSESSMENT.
EVIDENCE.U. S. CIRCUIT COURT, EASTERN DISTRICT
OF PENNSYLVANIA.

Michener v. Payson, Assignee, &c.

Decided October 4, 1875.

*The assignee of a corporation, by virtue of bankruptcy, has complete dominion over the assets transferred to him, and could sue for the recovery of an unpaid assignment upon stock.**An exemplification of a portion of the bankruptcy record is admissible to prove the assignment in bankruptcy and the assessment by the authority of the Court.**It is incompetent for the defendant to testify that he had purchased the stock upon representations of the company's agent, which had not been carried out.*

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Assumpsit by Payson, assignee in bankruptcy of the Republic Insurance Co., of Chicago, against Michener, a resident of Philadelphia.

The following cause of action was set forth in the declaration: The Republic Insurance Co. issued shares of stock, at the par value of \$100, upon certain terms, viz.: The real and personal property of each stockholder was to be held liable for losses of the company in the amount of stock held by him, and not actually paid in; twenty per cent. of the par value was to be paid in upon delivery of the certificates, and the remaining eighty per cent. was to be assessed only in the event of the twenty per cent. cash fund of the company becoming exhausted by losses. In 1871, the defendant became the owner of twenty shares of stock, having agreed to the above terms, and having paid \$400,

or twenty per cent. of the par value of the same, to the company upon receipt of the certificates. Later in the same year the company met with severe losses by reason of the Chicago fire, whereby the whole of the twenty per cent. cash fund, and all funds possessed by them, were exhausted, and in 1872 the company was adjudicated bankrupt, and Payson was duly appointed assignee. In 1873, the Bankruptcy Court in Chicago decreed that a call and assessment should be made upon the stockholders of sixty per cent. upon each share of unpaid stock, and if default in payment should be made after March 1st, 1873, after proper notice and publication, the assignee should be empowered to bring suit for its recovery. The defendant had refused to pay the sixty per cent. assessment, and the amount claimed was \$1,200 with interest.

Plea, non assumpsit.

Upon the trial, after proof of the conditions above mentioned, and of the defendant's ownership of the stock, the plaintiff offered in evidence as exemplification of the record of the Bankruptcy Court of Chicago to prove (1) the assignment to the assignees in bankruptcy, and (2) that an assessment had been decreed by the Court, and authority given to the assignee to collect it. Admitted under objection by the defendant, (1) that the papers were not properly bound together; (2) because it was not a copy of the whole record; and, (3) it did not appear that the defendant had notice of the proceedings referred to therein.

The defendant offered to prove by his own testimony that he was induced to purchase the stock by the representations of the agent of the company in Philadelphia, to the effect that all Philadelphia subscriptions were to be the capital stock of a Philadelphia branch of the company, to be securely held and invested in Philadelphia under the management of a local board of directors, elected by the Phila-

delphia stockholders; that this arrangement was, in fact, carried out for about twenty months, when the company abolished the local branch at Philadelphia and the local board of management without the consent of the Philadelphia stockholders. Objected to; objection sustained.

The defendant then offered to prove, by the testimony of the assignee, Payson, (1) that the company before bankruptcy had abolished a similar branch office in New York, and had bought back from the local stockholders there, the stock they had subscribed for, and had released them from all liability for any further assessment on the stock; (2) that after the Chicago fire the insured received a payment of twenty-five per cent. of their losses, and in consideration of immediate payment released the company from further liability, which releases the company afterwards surrendered without consideration, and allowed them to prove their claims in full, on account of which the assessment became necessary; and (3) that losses to a large amount were adjusted by the company, and policy holders and stockholders were permitted by the company to pay their assessment by certificates of indebtedness, issued for adjusted losses after insolvency.

Objections to these offers were sustained.

The defendant then testified that he paid \$500 when he received his certificate of stock, \$400 on the stock, and \$100 premium.

The Court charged the jury that the plaintiff was entitled to recover the amount claimed by him, unless the defendant was entitled to a credit of \$100.

Verdict for plaintiff for \$1,232.

Defendant assigned as error: The admission in evidence of the exemplification of the bankruptcy record, the rejection of his offers, and the charge of the Court as given above.

Held, 1, That by virtue of the adjudi-

cation and his appointment, the assignee acquired complete dominion over the assets of the company; that it was an unquestionable faculty of the board of directors to assess ratably; that the assignee succeeded to this right, subject to the order of the Bankrupt Court; that the court having exercised its jurisdiction, the right to make assessment could not be questioned collaterally, and the plaintiff was entitled to recover.

2. The exemplification of the record was admissible; proceedings in bankruptcy do not constitute an integral record; the bankrupt act contemplates that any portion may be used as evidence where properly authenticated.

3. That the evidence offered by defendant was incompetent; the equities of the creditors were superior to defendant's, and must prevail.

Judgment affirmed.

Opinion by *McKenna, J.*

MUNICIPAL CORPORATIONS. DIVISION OF BY THE LEGISLATURE.

U. S. SUPREME COURT.

The Board of the County Commissioners of the County of Laramie, *appls. v.* The Board of the County Commissioners of the County of Albany, and the Board of the County Commissioners of the County of Carbon.

Decided February 1875.

The legislature of a State has authority to make a division of a municipal corporation, and upon such terms and under such regulations as it deems proper.

Accordingly where a legislature divided one county into three without providing for the payment of the debts of the old county, the presumption is that the old corporation is responsible for all the debts contracted before the separation, and a bill in equity, on its behalf against the new to compel contributions for their propor-

tion towards such indebtedness, cannot be maintained.

Appeal from the Supreme Court of the Territory of Wyoming.

The complainant county was first organized under the act of the third of January, 1868, passed by the legislature of the Territory of Dakota, which repealed the prior act to create and establish that county. When organized the county was still a part of the territory, and embraced within its territorial limits all the territory now comprising the counties of Laramie, Albany, and Carbon, in the Territory of Wyoming, an area of three and one-half degrees from east to west, and four degrees from north to south. Very heavy expenses, it seems, were incurred by the county during that year and prior thereto, greatly in excess of their current means, as more fully explained in the bill of complaint, which increased the indebtedness to the sum of twenty-eight thousand dollars. Other liabilities, it is alleged, were also incurred by the authorities of the county, during that period, which augmented their indebtedness to the sum of forty thousand dollars in the aggregate.

Pending these embarrassments the charge is that the legislature of the territory passed two acts on the same day, to wit, December 16, 1868, creating the counties, of Albany and Carbon, out of the western portion of the territory of the complainant county, reducing the area of that county more than two-thirds; that by the said acts, creating said new counties fully two-thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its limits were reduced to less than one-third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debts and liabilities which had been incurred for the welfare of the whole, before these acts were passed.

Payment of the outstanding debt having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion towards such indebtedness. Attempt is made to show that an equitable cause of action exists in the case, by referring to the several improvements made in that part of the territory included in the new counties, before they were incorporated, and by referring to the great value of the property withdrawn from taxation in the old county, and included within the limits of the newly created counties.

Process was served and the respondents appeared and filed separate demurrers to the bill of complaint. Hearing was had, in the district court of the territory, where the suit was commenced, and the court entered a decree sustaining the demurrers and dismissing the bill of complaint. Immediate appeal was taken by the complainant to the supreme court of the territory, where the parties having been again heard, the supreme court entered a decree affirming the decree of the district court, and the present appeal is prosecuted by the complainant.

Two errors are assigned, as follows:

1. That the supreme court erred in affirming the decree of the district court sustaining the demurrers of the respondents to the bill of complaint.

2. That the supreme court erred in rendering judgment for the respondents.

Held, 1. Counties, cities and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the State Constitution otherwise provides, and that the legislature possesses the power to divide them at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable; they are the mere creatures of the legislative will, and

their powers may be enlarged, modified or diminished at any time without their consent, or even without notice.

2. Where no regulations upon the subject are prescribed by the legislature the presumption is, that no legislation was considered necessary, and the rule is that the old corporation owns all the property within its new limits, and is responsible for all debts contracted by it before the act of separation was passed. Old debts it must pay without any claim for contribution, and the new subdivision has no claim to any portion of the public property except what falls within its boundaries, and to all that the old corporation has no claim.

Decree affirmed.

Opinion by *Clifford, J.*

SUPERVISOR. TOWN BONDS.

N. Y. COURT OF APPEALS.

People *ex rel* Atkinson et al, Commissioner of Highways of the town of Cornwall, *appls.*, v. Tompkins, Supr., &c., *respt.*

Decided February 1, 1876.

Section 1, Chap. 855, of the laws of 1869 as amended by Chap. 260, laws of 1874, and Sec. 2, of the former as amended by the latter act, provides for two separate and distinct classes of cases.

The provision of Sec. 1, that the officers must meet on the first Monday in September, is merely directory.

A Board of Supervisors are empowered to name the officer by whom town bonds. to raise money for road or bridge improvements, shall be executed.

This was an application for the issuing of a mandamus to compel defendant, as supervisor of the town of C., to issue and negotiate certain bonds of the said town to defray the expenses of building and repairing roads. It appeared that, upon a certificate of the town officers purporting

to have been issued in pursuance of Sec. 1, Chap. 260, laws of 1874, certifying the sum necessary, and giving their consent to the borrowing of said sum, and which was presented at the next ensuing meeting of the Board of Supervisors the latter, in pursuance of the power conferred by §1, chap. 855, laws of 1869, and chap. 260, laws of 1874, amending the same, authorized and directed defendant, the supervisor of the town of Cornwall, to borrow said sum of money upon the credit of said town, and prescribed the form of the obligation to be given, the time of maturity, rate of interest, mode of execution and negotiation, &c. Two thirds of the members of the board did not vote in favor of the resolution and defendant voted against it. The relators requested defendant to borrow the money as directed, and he refused upon the ground that the provisions of §2, chap. 855, laws of 1869, as amended by chap. 260, laws of 1874, had not been complied with. This section confers upon the Board of Supervisors authority to provide for the use of abandoned turnpike, plank or macadamized roads as public highways as well as the improvement of public highways, and the location, erection, repairs and purchase of bridges, and provided that the vote of two thirds of the board and that of the supervisor of the town or wards affected by the debt to be incurred was requisite before a resolution directing such a measure could be passed. This section nowhere refers to the preceding section or to any proceedings under it. The town officers are not named.

Samuel Hand, for applt.

H. Gedney, for respt.

Held, That the two sections were intended to provide for two separate and distinct classes of cases; that a two thirds vote and the consent of the supervisor was not necessary when application was made by the town officers under the first section, and that defendant was not justified in refusing to issue the bonds.

It was provided by the first section that the town officers must meet on the first Monday of September. If there was no quorum, or the board could not agree, they could then adjourn, but no such meeting could be held after the first Monday of October. There was no meeting on the day named and no adjournment. The meeting at which the resolution was passed was held September 24th.

Held, That this provision of the statute was merely directory, and it was sufficient that a meeting was held prior to the first Monday of October instead of the day specified.

Held, also, That as the statute authorized the Board of Supervisors to prescribe the form of the obligations to be issued, the name of the officer who was to execute them was necessarily included, and the board did not exceed its powers in requiring defendant to execute the bonds.

Judgment of General Term reversed and mandamus issued as directed by order of Special Term.

Opinion by *Miller, J.*

COURT OFFICER'S SALARY.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Cabill, appt. v. The Mayor, &c., of New York, resp.

As to whether Court Officers are entitled to extra compensation for the care of individual jurors by night and on days when the court is not holding, is for the Board of Supervisors to determine and not for the courts.

Appeal from judgment dismissing complaint at Circuit.

Plaintiff had been summoned by the sheriff to act as court officer and constable in the Court of Oyer and Terminer. In obedience to the summons he attended the court and received the regular daily allowance for such services.

He was, however, during this time, called upon to take charge of certain individual jurors, in addition to his services in the court, and was obliged in discharging the latter duties to remain with them through the night and during such days as the court was not in session, for which latter services he claimed an extra allowance.

The complaint was dismissed by the court at circuit.

On appeal,

Roberts & Strahan, for appt.

D. J. Dean, for resp.

Held, That the services rendered were such as are always performed by the officers in attendance when it may be deemed necessary, and may be required by the court, and were incidental to the plaintiff's employment.

But even if an extra allowance were proper the courts can take no action in the matter, as by law the Board of Supervisors must determine whether there should be any extra allowance, and if so, what amount should be allowed; and without the action of that board plaintiff can only demand the compensation which is provided for his attendance upon the court, and has no such right to any further compensation as will enable him to maintain an action for its recovery.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.*, concurring.

TITLE. EVIDENCE.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Chadwick, resp., v. Fanner, appt.

Decided January, 1876.

Parol declarations are admissible as against an alleged vendor, and his heirs and grantees, to prove that the vendee has paid the purchase money. Possession by a vendee is equivalent to notice of a claim.

Evidence. Harmless error.

In 1868, the defendant, John Fanner, purchased the premises in suit of the heirs of one L. L. had died in 1861. The land in suit is 12 acres, and Fanner's purchase was 60 acres and included the land in suit.

The plaintiff, John Johnson, claims to have purchased the 12 acres in suit of L. by a parol agreement of sale, and that he lived in a shanty on the land in suit for a good many years after his purchase and prior to the death of L.

The referee found for plaintiff Johnson. The main question on the trial was whether the admissions of L. after he had parted with his title were admissible to defeat the title of defendant which he acquired through L.

Evidence of a witness, Chadwick, was received on the trial on behalf of Johnson in regard to the declarations of Johnson as to his own title and possession.

Farwell & Brazee, for resp't.

Lewis & Gurney, for appl't.

Held. That the parol declarations of a vendor of land are admissible in an action by or against him, to prove that the vendee has paid the purchase money. The declarations of Locke, therefore, would have been competent against him. He died intestate. The land in controversy descended to his heirs, and they conveyed it to Fanner. Those declarations being evidence against Locke in his lifetime, they are since his decease, evidence against all who have derived title through or under him, with notice of the vendee's claim. It is very true that parol declarations are insufficient to destroy a man's title to land. But when made by a vendor against his interest, they are sufficient to fasten a trust upon the legal title in favor of a vendee, as against the grantees of such deceased vendor, immediate or remote, who took the title with notice of the claim of the vendee, and the actual possession of the land by the vendee is in law equivalent to actual notice of such claim whatever it may be.

We are of opinion that the referee erred in allowing the question put to the witness Chadwick as to the declarations of Johnson regarding the character of his possession. But the answer of the witness was hardly responsive to the question and as no motion to strike out the objectionable testimony was made, the objection to the question may well be deemed waived. We are satisfied that it did not affect the result.

The error became harmless, and affords no just ground for reversing the judgment. The judgment must be affirmed with costs.

Opinion by *Gilbert, J.*; *Mullin, P. J.* and *Smith, J.*, concurring.

BANKRUPTCY. EVIDENCE.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Ross Lewin as assignee, &c., *resp't.* v.
Redfield, appl't.

Decided January, 1876.

Whether there be any evidence at all of a fraudulent preference under the Bankrupt Act is a question for the court; the sufficiency of the evidence is a question for the jury.
The rule as to confidential communications between attorney and client stated.

This action was brought by plaintiff as assignee in bankruptcy, to recover money said to have been received as a fraudulent preference under the Bankrupt act.

The jury gave a verdict for plaintiff.

On the trial the court received in evidence a letter written to defendant's attorneys, under defendant's instructions, to Messrs. Rowley & Parker, under defendant's objection, that it was a privileged communication between attorney and client, &c. On the trial evidence was given showing that the money defendant received came from one K, and that it was the consideration paid by Kilmer for an assignment of a mortgage, and the

witness was asked, "Who made the assignment?" It was objected to as giving parol evidence of the contents of a written instrument.

Held, That there was evidence sufficient to warrant the court in submitting the case to the jury. Whether there be any evidence is a question for the court; whether this evidence is sufficient is a question for the jury.

That the letter from defendant's attorney, Reed, to R. & P., was not such a confidential communication between attorney and client as to make the same privileged, and the rule as to a privileged communication similar to the one in suit could never be invoked to shield a party in violating the law, and section 390 of the Code has effectually abrogated whatever privilege parties may have before enjoyed.

The letter from Mr. Reed was properly received. It was written by the direction of the defendant, and it does not fall within the rule which excludes offers made pending a treaty for a compromise.

That the question asked witness as to the Kilmer assignment was competent. It did not necessarily call for the contents of a written instrument.

Judgment affirmed.

Opinion by *Gilbert, J.*; *Mullen, P. J.*, and *Smith, J.*, concurring.

EXTRA ALLOWANCE.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Duncan, applt. v. Dewitt, respt.

Decided March 6, 1876.

Order directing payment of an extra allowance since it affects a substantial right is appealable.

Extra allowance should be granted only in cases that are both difficult and extraordinary.

Appeal from order granting an extra allowance, and from dismissal of plaintiff's complaint.

Complaint.—Breach of a contract for the sale of property and damages therefor.

Answer.—Plaintiff's failure to perform in the payment of the purchase price.

After having been once or twice on the day calendar, this cause was set down peremptorily for 13th of May, 1875, when, plaintiff defaulting, complaint was dismissed.

The default was afterward opened and the cause restored to the calendar. The cause being reached December 15, 1875, plaintiff sought to discontinue on payment of costs.

Counsel for defendant asked for a dismissal of the complaint, with costs and extra allowance.

Complaint was dismissed with costs, and an allowance of \$1,000.

Geo. Bell for applt.

Sam'l A. Noyes for respt.

On appeal. *Held*, That plaintiff clearly did not intend to try the cause on the issues raised by the pleadings, and the complaint was therefore properly dismissed.

The order directing the payment of an extra allowance, since it affects a substantial right, is properly appealable.

As the Code now stands, after an answer has been interposed, the court may, in finally disposing of the case, order an extra allowance (Code, sec. 309), but the case must appear to be both difficult and extraordinary.

Cases of frequent occurrence which can be tried without much labor or preparation, with the principles of which counsel are presumed to be familiar, do not come within this provision of the Code.

These allowances add greatly to the burdens of legal proceedings and should be restrained, rather than extended.

This case does not appear in any way to have been either difficult or extraordinary, and clearly is one where no extra allowance should have been made.

Order directing allowance reversed, and application denied.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring; *Brady, J.*, concurring in result.

EASEMENT. DAMAGES.

CONNECTICUT SUPREME COURT OF ERRORS.

Robertson v. Woodworth.

Decided March Term, 1875.

Where a mill-owner has a right to the use of a reservoir and dam, the fee belonging to a third person, and is charged with the duty of maintaining the dam, and a riparian proprietor below erects a dam which sets the water back upon the reservoir dam, he can recover only for the injury to his easement.

A diminished benefit from the use of the reservoir, or an increase of the cost and trouble in keeping the dam in repair, or an obstruction of the plaintiff in his right of repairing, would constitute such an injury.

Trespass on the case; brought to the Superior Court in New London county, and tried to the jury on the general issue, before Hitchcock, J. Verdict for the plaintiff, and motion for a new trial by the defendant for error in the charge of the court.

Upon the trial of this cause to the jury, the plaintiff introduced evidence to prove that he was the owner of a reservoir dam and pond situated upon a stream of water called Alewife Brook, in the town of Waterford, and of the land covered by it, together with the right and privilege of supplying his paper mill with water from it; and that the defendant erected a permanent dam across the stream between his paper-mill and the reservoir, and thereby wrongfully and injuriously caused the water of the stream to set back upon the reservoir dam and into the stonework and outlet thereof to the depth of about eighteen inches, and thereby endangered

the foundations and superstructure of the dam.

The defendant claimed to be the owner of all the riparian rights on the stream between the reservoir dam and the pond of the plaintiff's paper-mill, under a lease from Ann D. Miller and others; and that in the exercise of his rights as such owner he had built the dam complained of, for the accumulation of water for use at his own mill. He admitted that the plaintiff had the right to maintain and use the reservoir dam for the purpose of accumulating water until wanted for his paper mill, and also the right to draw the water from the reservoir pond as he had occasion, for the use of his mill. But he denied that the plaintiff was the owner of the reservoir dam, and introduced evidence by which he claimed to have proved that the fee of the dam was in the said Ann D. Miller and the heirs of John S. Miller, the defendant's lessors. And he claimed that if the fee of the dam was in the Millers, the plaintiff could not recover damages for the setting back of the water against the reservoir dam, even if the burden of maintaining it was on the plaintiff. On this part of the case the court charged the jury that if they should find that the defendant, by means of his dam, had caused the water to set back upon the reservoir dam in the manner claimed by the plaintiff, the plaintiff was entitled to recover damages therefor, even though they should find the fee of the reservoir dam to be in the Millers, provided the jury should also find that the plaintiff was charged with the burden of keeping it in repair.

Held, The defendant, as owner of the servient estate, may make the fullest use of his riparian rights and gain all possible profits therefrom, provided he does not thereby hinder, obstruct or disturb the plaintiff in repairing and maintaining the reservoir dam, does not increase the labor or cost of such maintenance and repara-

tion, does not endanger or weaken its foundation or superstructure, and does not in any way diminish the use or convenience of the servitude of the owner of the dominant estate.

So far then as this hypothesis is concerned, this action must be deemed to have been instituted by the plaintiff for an injury to his easement by the owner of the servient estate as a result of his effort to make an advantageous use thereof; and it is not sufficient to enable the plaintiff to recover, that he should prove, simply, that the defendant had set the water back upon the reservoir dam; but he must also prove that he was thereby disturbed in the enjoyment of his easement, or hindered or obstructed in the exercise of his right of reparation and maintenance, or that the labor and cost thereof had been increased, or that the foundations or superstructure of the dam had been endangered.

Inasmuch as the charge to the jury based the plaintiff's right of recovery merely upon the fact that the burden of maintenance and repair rested upon him, irrespective of the question whether the defendant had increased that burden or had disturbed him in the use and enjoyment of his easement, we think there should be a new trial.

Opinion by *Pardee, J.*; the other judges concurred.

MUNICIPAL CORPORATION. LIABILITY FOR NEGLIGENCE.

U. S. SUPREME COURT.

William Barnes, *plff. in error*, v. The District of Columbia.

Decided March, 1876.

A municipal corporation is liable for injuries arising from the negligent construction of a work by one of its subordinate departments, although it may not have the power to appoint, remove, or control the officers constituting such department.

In error to the Supreme Court of the District of Columbia.

This is an action to recover damages for a personal injury received by the plaintiff on the 14th of October, 1871, in consequence of the defective condition of one of the streets of the city of Washington. The accident occurred on K street east, and arose from the construction of the Baltimore & Potomac railroad through that street. The road was built by permission of the corporation, and authority was given to the road to change the grade of the streets according to a plan filed. In making this change a deep pit or excavation was made, into which the plaintiff fell. The injury to the plaintiff, the defective condition of the street, and the negligence of those having it in charge, are not under consideration. These questions were submitted to the jury, and the jury found the issue upon each of them in favor of the plaintiff. The verdict of the jury, by which they awarded to the plaintiff the sum of three thousand five hundred dollars as damages, besides his costs, and the judgment thereon, were set aside by the General Term of the district, and judgment ordered in favor of the defendant. From this judgment the present writ of error was brought.

The municipal corporation, "the District of Columbia," was organized under the act of Congress of February 21st, 1871. (16 Stat. at Large, 419.)

The first section of the act creates a municipal corporation by the name of the District of Columbia, with power to sue, be sued, contract, have a seal, and "exercise all other powers of a municipal corporation, not inconsistent with the laws and Constitution of the United States, and the provisions of this act."

By section second the executive power is vested in a governor, to be appointed by the President, with the consent of the Senate, and to hold his office for four years. Bills passed by the council and

house of delegates were to be presented to him for approval or rejection.

A secretary of the district is also provided for, whose duties are specified. The legislative power in the district is vested in two bodies, a council and house of delegates, called a legislative assembly, which power it was in the 18th section declared should "extend to all rightful subjects of legislation within said district, consistent with the Constitution of the United States and the provisions of this act."

It is enacted that the President, with the consent of the Senate, shall appoint a board of health, consisting of five persons, whose duties are pointed out. The salaries of the governor and secretary are prescribed, and are to be paid "at the Treasury of the United States." The salaries of the members of the legislative assembly are prescribed, but it is not declared where or how, or by whom they shall be paid, unless they are included in the general terms of section thirty-eight.

By the 37th section it is provided that there shall be a "board of public works, to consist of the governor and four other persons to be appointed by the President, with the consent of the Senate, who shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, and alleys and sewers of the city, and all other works which may be entrusted to their charge by the legislative assembly or Congress." They are also required to disburse the money collected for such purposes, and to make an annual report of their proceedings to the legislative assembly, and to furnish a duplicate of the same to the governor.

The charters of the cities of Washington and Georgetown are declared to be repealed, except that they are continued in force for certain specified purposes, not necessary to be here considered.

The statute creating this corporation in

its first section declares it to be a body corporate, not only with power to contract, to sue and be sued, and to have a seal, but also that it is a body corporate for municipal purposes, and that it shall exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act. (16 Stat., p. 419.)

The full text of section 37 is as follows:

"Sec. 37. *And be it further enacted,* That there shall be in the District of Columbia a board of public works, to consist of the governor, who shall be president of said board; four persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, one of whom shall be a civil engineer, and the others citizens and residents of the district, having the qualifications of an elector therein; one of said board shall be a citizen and resident of Georgetown, and one of said board shall be a citizen and resident of the county outside of the cities of Washington and Georgetown. They shall hold office for the term of four years, unless sooner removed by the President of the United States. The board of public works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be entrusted to their charge by the legislative assembly or Congress.

"They shall disburse upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property-holders, in pursuance of law, for the improvement of streets, avenues, alleys, and sewers and roads and bridges, and shall assess in such manner as shall be prescribed by law, upon the property adjoining, and to be specially benefitted by the improvements authorized by law and made by them, a reasonable proportion of the cost of the im-

provement, not exceeding one-third of such cost, which sum shall be collected as all other taxes are collected.

"They shall make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative assembly.

"All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the district; and said board of public works shall have no power to make contracts to bind said district to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made. All contracts made by said board, in which any member of said board shall be personally interested, shall be void, and no payment shall be made thereon by said district, or any officers thereof. On or before the first Monday in November of each year they shall submit to each branch of the legislative assembly, a report of their transactions during the preceding year, and also furnish duplicates of the same to the governor, to be by him laid before the President of the United States for transmission to the two houses of Congress; and shall be paid the sum of two thousand five hundred dollars each annually."

Held, 1. That a municipal corporation is liable for an injury to an individual arising from negligence in the construction of a work authorized by it; but a distinction is to be noted between the liability of municipal corporations made such by the acceptance of a village or city charter, and involuntary *quasi* corporations known as counties, towns, and school districts; the liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation.

2. That the board of public works was not an independent body, and that its proceedings, in the repair and improvement of the street, out of which the action arose, are the proceedings of the municipal corporation.

It makes no difference that the municipality had not the power to appoint or remove or control its members, the act creating the corporation intended to make it a portion of the corporate body.

Judgment reversed and cause remanded with directions to affirm the judgment of the Special Term upon the verdict.

Opinion by *Hunt, J.*; *Swayne, Strong, Field*, and *Bradley, J. J.*, dissent; the two latter upon the ground that the district should not be responsible for the neglect and omissions of officers whom it has no power to select or control.

EXAMINATION OF WITNESS.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Abraham Hewlett, *respt.* v. Samuel A. Wood et al., *appls.*

Decided January, 1876.

A party in whose behalf a witness is examined under the provisions of the Revised Statutes allowing the examination of witnesses for the purpose of perpetuating their testimony, cannot properly file the deposition until the examination of the witness is completed, although the Judge may have subscribed and certified it. The Judge before whom the examination is had may limit the cross-examination in order to prevent its unnecessary continuance for the purpose of annoying the witness.

Appeal from orders denying motions made to suppress a deposition.

The motions were made on behalf of the defendant, Samuel A. Wood, to suppress the deposition of the defendant Samuel Wood, for the reason that the cross-examination had not been completed

at the time when it was certified and filed. The deposition was taken under the provisions of the Revised Statutes for perpetuating the evidence of witnesses. 3 R. S., 5th ed., 681-3.

The witness was aged, feeble, and infirm, and when last cross-examined requested to be excused, apparently because he could no longer endure the effort required in understanding and answering the questions propounded to him. The right to cross-examine the witness farther was not abandoned or surrendered, but a day was fixed for the further cross-examination of the witness. On the day to which the further hearing of the testimony was postponed, and upon several subsequent adjourned days, the witness was unable to be present, so that the examination could proceed. Finally it was agreed between counsel that the matter be adjourned over until a day when the physician of the witness should give information to his counsel that the witness was able to proceed with the examination, of which day the parties should have notice.

On the 11th of May, 1875, the day preceding the date of the last arrangement, the deposition was subscribed and certified by the Justice before whom the proceeding was pending, and on the following 21st day of May was filed with the clerk.

E. T. Schenck for resp't.

Abraham Wakeman for appl'ts.

Held, That the statute under which this examination was had contemplates its completion before it can be subscribed by the witness or certified by the officer taking it. These are both acts which must be performed before any right to file it can exist. That a party has no right to use the privilege of cross-examination for the purpose of simply annoying, exhausting, or perplexing the witness, and that when that may appear to be the object the court may in these proceedings interfere and prevent it by closing the examination (47

How., 193), but no such objection as that was made before the parties last separated, and it consequently could not have been considered or acted upon by the justice in this case.

The deposition of the witness should not be suppressed nor set aside, but it should be completed in conformity to the understanding on which the parties acted when they were last before the officer.

So ordered, costs to abide event.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring.

DOWER. RELEASE OF.

SUPREME COURT OF PENNSYLVANIA.

Campbell et al. v. Hammett.

Decided January 17, 1876.

An agreement releasing a married woman's right of dower made after marriage, will be declared void in equity, where it appears to be a fraud upon her rights, unequal and unjust, and executed under suspicious circumstances.

Before the jurisdiction of the Orphans' Court has attached such a proceeding is properly brought on the equity side of the Common Pleas.

Certiorari from Nisi Prius. In equity.

This was a bill in equity brought by the widow of testator against the executors, asking a decree to avoid: 1st. An alleged agreement of Mrs. Hammett relinquishing her right of dower, &c., dated the day of her marriage, but executed after the marriage. 2d. Another agreement subsequently made, reciting the first agreement, agreeing to accept \$1,200 per annum in lieu of all claim on her husband's estate, and praying that said executors might be enjoined from setting up the said agreement in bar of her rights as widow, &c. The testator in his will having relied upon the validity of the agreements had made no provision for her.

This case was referred to Hon. James

Thompson, late Chief Justice, who reported in favor of complainant's equity: 1st. Because the first writing was made after marriage. 2d. Because the last agreement incorrectly recites the first, and was not read to her at the time of execution, that she was in ignorance of its contents, and it was manifestly unequal and unjust, the husband's estate exceeding \$1,000,000.

Objection was made that this case was exclusively within the jurisdiction of the Orphans' Court. The master decided that the Court of Equity was the proper tribunal, and that the functions of the Orphans' Court were not in any manner infringed by the proceeding, and reported a decree in accordance with complainant's prayer, which report and exception and agreement was confirmed by the court at Nisi Prius.

The executors appealed.

Held, The marriage settlement was post nuptial, and most probably was dictated by Mr. Hammett himself. The second writing misrecited the first in important particulars. We think Mrs. Hammett was not bound by either.

We concur with the master that the Court of Common Pleas had jurisdiction of this bill. It involved no questions of settlement and did not touch the estate of Mr. Hammett, except in its consequences, as the conveyance may attend any other proceeding or action in the Common Pleas.

Decree affirmed.

Per curiam opinion.

BANKRUPTCY. COMPOSITION. ATTACHMENT.

COURT OF APPEALS OF THE STATE OF MARYLAND.

John M. Miller v. George N. Mackenzie.

13 N. B. R., 496.

After a resolution of composition in

bankruptcy has been duly adopted and confirmed, the debtor may have an attachment quashed that was issued against his property before the commencement of the proceedings in bankruptcy, for the debt is thereby extinguished.

On the 4th of November, 1874, the appellant sued out of the Court of Common Pleas an attachment, on mesne process, against G. N. Mackenzie, C. B. Mackenzie, and C. T. Mackenzie, partners in trade, which was returned by the sheriff, "*laid as per schedule.*"

The defendants, at January Term, 1875, moved to quash the attachment, for various reasons assigned, and afterwards, on the 25th of May, 1875, filed a special plea, alleging that the defendants were duly adjudicated bankrupts upon the 5th of December, 1874, upon the petition of their creditors, filed the 25th of November, 1874; that after said adjudication, a meeting of the creditors of said defendants was duly called, under the amendatory act to the National Bankrupt Act, section 17, approved June 22, 1874; that at said meeting, at which plaintiff, although present, took no part, and did not vote upon or sign the resolution, a resolution for composition of the debts of said defendants for twenty-five per cent. cash was duly passed and confirmed, under the provisions of said act, and the statement required by said act was duly produced, and therein the names, address, and amount of the debts of said plaintiff was duly sworn in said statement; that said resolution and statement were duly presented to the Judge of the District Court of the United States for Maryland District, and said court duly caused said resolution to be recorded, and the said statement to be filed; that the amount of money properly due said plaintiff under said proceedings for composition, was duly tendered to him, and by him refused; and all the other creditors have accepted said propositions, and been paid.

It was agreed by the counsel for the plaintiff and defendants in the court below, that the motion to quash should be set down for hearing upon a statement of facts, substantially the same as those embodied in the plea, and which we deem it, therefore, unnecessary to recite.

Whereupon the court, on the 22d of May, 1875, ordered that the attachment be quashed, from which order the plaintiff appealed.

Held, That the composition proceedings extinguished plaintiff's debt, and that the attachment must fall to the ground.

Order affirmed.

Opinion by *Bowie, J.*

MANDAMUS.

N. Y. SUPREME COURT—GENERAL TERM. FIRST DEPARTMENT.

The People, &c., ex rel., Ferdinand Kurzman, *applt.* v. Andrew H. Green and others, composing the Bureau of Revision and Correction of Assessments, and the Board of Assessors of the City of New York.

Decided March 6, 1876.

Jurisdiction of Central Park Commissioners.

The owner of land at the time the change of grade is in fact completed is the person who is damaged, and is the person entitled to the award for damages done to property by a change of grade.

Appeal from order of Special Term denying mandamus.

The relator is the owner of a house and lot of land on the northerly side of 123d street, New York City, between 6th and 7th Avenues. The building upon said lot of land was erected after the grade of said street was established in 1853, and in conformity with such established grade and before the change of grade in 1867.

The said house and lot of land were purchased by the relator in May, 1872.

The grade of said street was established in 1853, and said grade was changed and a new grade therefor established in 1867. After said change of grade, and after May 31st, 1872, said street was regulated and graded in conformity with such new grade, the expense of so regulating and grading said street was assessed by the Board of Assessors upon the property benefited thereby; and the damage to the land of the relator by reason of the change or alteration of the grade of said street, and the regulating and grading thereof according to said new grade, assessed at \$1,888.

The assessment lists, including and containing said award or assessment of damages, were transmitted to the Board of Revision and Correction of Assessments, February 11th, 1874; and on March 26th, 1874, said assessment lists were returned by said Board of Revision and Correction of Assessments to the Board of Assessors, with directions to them "to omit the assessments for and awards of damage by reason of change of grade," for the alleged reason that the Board of Assessors had no power to include the sums awarded to the relator and others in said assessment lists, or to make the said award.

The relator asks for a writ of mandamus compelling the Board of Revision and Correction of Assessments to receive and enter the title of the assessment list for regulating and grading 123d street from Mount Morris Square to Eighth Avenue, in the City of New York, as duly confirmed, as of the 15th March, 1874. And that the Board of Assessors retain without amendment or alteration the awards made to this relator for damages done by reason of the change of grade of said street, and that the amount allowed to this relator for damages be included and allowed in and by said assessment list.

The following questions were raised by the appeal:

1. Whether the Commissioners of Central Park had jurisdiction to alter the grade of 123d street at the point where the appellant's dwelling house had been erected.

2d. Whether the appellant is entitled to damage, he not being the owner of the property at the time the change of grade was determined upon by the Park Commissioners.

Kurzman & Yeaman for applt.

Hugh L. Cole for respts.

Held, We think the Commissioners of Central Park had full jurisdiction to alter the grade of 123d street at the point where the appellant's dwelling house had been erected, and that the provisions of section 3, chap. 52 of the laws of 1852, in respect to the estimate of loss and damage sustained by reason of such change of grade are applicable to this case.

That the time within which the Board of Revision had to act had expired.

That the owner of the property in 1867, when the new grade was established, is not the person entitled to the award, as the change of grade had not been completed. It is impracticable, we think, properly to ascertain and determine such damage, until the change in the grade be in fact completed. And it seems to us quite apparent that no damage within the contemplation of the law is done until that event occurs; and that if the action of the Park Commissioners had never been carried into effect by an actual change, it is clear there would have been no loss or damage sustained.

The order below should be reversed, and the writ of mandamus granted.

Opinion by *Davis, P. J.*; *Daniels* and *Brady, J. J.*, concurring.

INDICTMENT. FELONY. MISDEMEANORS.

SUPREME COURT OF PENNSYLVANIA.

Hunter et al, v. The Commonwealth.

Decided November 15, 1875.

On an indictment charging a felony, the jury may acquit of the felony, and convict of the constituent misdemeanor.

Error to the Quarter Sessions of Alleghany Co.

The defendants were indicted on a single count for a felonious assault. *Plea non cul. et de hoc; similiter* and issue. Verdict, "guilty of an assault."

A motion in arrest of judgment, on the ground that the indictment for a felony did not warrant a conviction for misdemeanor, having been overruled, the defendant took this writ of error, assigning for error the overruling of the motion and the entry of judgment on the verdict.

Held, That the common law rule that upon an indictment for a felony, there can be no conviction for a misdemeanor no longer exists in Pennsylvania.

Judgment affirmed.

Opinion by *Paxon, J.*

JURISDICTION.

U. S. SUPREME COURT.

Magdalena A. Zeller, et al., plffs. in error, v. Edgar A. Switzer, defts. in error.

Decided January, 1876.

To give this court jurisdiction to review the decision of a State Court, the judgment of the latter must be final.

In error to the Supreme Court of the State of Louisiana.

This action was brought upon a bond given to release the steamboat *Frolic* from a provisional seizure. The defendants answered the petition November 25, 1870, setting up several defenses, and, Dec. 5, 1870, filed a peremptory exception. The court below upon hearing sustained this exception, and gave judgment in favor of the defendants. The defenses set up in the answer were not passed upon.

From this judgment an appeal was taken to the Supreme Court, where a judgment was entered as follows:

"On appeal from the second judicial court, parish of Jefferson, it is ordered and adjudged that the judgment of the lower court be set aside; that the exception be overruled; that the case be remanded to be proceeded with according to law, and that the appellee pay costs of appeal."

To reverse this judgment the present writ of error has been prosecuted, and a motion is now made to dismiss the writ because the judgment is not final.

Held, The judgment was not final. The State Supreme Court having merely reversed the judgment, the inferior court must now proceed further.

Writ dismissed.

Opinion by *Waite, C. J.*

NEGLIGENCE. REMOTE AND PROXIMATE CAUSE.

SUPREME COURT OF PENNSYLVANIA.

Pennsylvania Railroad Company, v. Hope.

Decided February 7, 1876.

In an action against a railroad for negligently firing plaintiff's woodland, whether or not the injury was the direct natural consequence of defendant's negligence, is a question for the jury.

Error to the Common Pleas of Chester county.

Case, *ex delicto*, by Hope against the Pennsylvania Railroad Company for damages caused by the negligent firing of his property by the defendants. Plea, "Not guilty."

The facts were these: The plaintiff was the owner of a farm through which the railroad passed east and west. On the morning of March 18, 1873, immediately after the mail train had passed west, fire was discovered at the end of a cross tie of the track; thence it spread to a small

quantity of dry weeds and rubbish which had been pulled up and deposited the previous autumn by the company's workmen on the roadway between the track and the plaintiff's fence. The fire thus reaching the fence destroyed a few panels thereof, and thence, impelled by a strong wind, burned across two dry grass fields to another fence, which communicated the fire to a tract of woodland inclosed by it. The distance between the railroad and the adjoining fence was five or six feet, and from the railroad to the woodland six hundred feet.

There was also evidence for the plaintiff that this engine, about a mile west of this farm, was on that day throwing out an unusual number of sparks, and was kindling fires along the roadside at every hundred yards. On the other hand, the defendants proved that the engine was provided with a spark-arrester as good as any then in use, and called two stack inspectors, who testified that the engine on that day started from Philadelphia and arrived at Harrisburg with its spark-arrester in perfect order. The defendants, in three distinct points, asked the court to charge that there was no sufficient evidence of negligence on their part as to either the rubbish or the roadway or the condition of the engine; and, in their last point, asked the court to instruct the jury as matter of law, that—

"The sparks emitted from the engine and the fire thereby caused upon the line of the defendant's roadway, were not the proximate cause of the burning of the fence between the pasture land and the woodland, or of the woodland itself, both the fence and the woodland being at least six hundred feet distant from the place where the fire originated."

The court below declined to affirm these points, and left it to the jury to say whether the burning of the woodland, and of the fence inclosing it, was the direct natural consequence of the defendant's negligence.

Verdict and judgment for the plaintiff for the full amount claimed, to which the defendants took this writ of error, assigning for error the answers to their points and the charge of the court.

Held, That the question of the proximity of the injury to the original cause was a question of facts peculiarly for the jury.

How near or remote each fact is to its next succeeding fact, in the concatenation of circumstances from the prime cause to the end of the chain of facts, which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken, that they become independent, and the final cause cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants.

Per curiam opinion.

EJECTMENT. EVIDENCE.

N. Y. COURT OF APPEALS.

Jones et al. *appls.* v. Smith, *respt.*

Decided February 22, 1876.

In an action of ejectment, evidence tending to show an acquiescence in and practical location of a boundary line for more than twenty years is admissible, although such line is not the true line described in plaintiffs' grant.

A witness being interrogated as to a conversation with B., and B. being called, testified to a particular conversation with witness, the witness can be recalled to deny specifically the alleged conversation testified to by B.

This was an action of ejectment brought by the ancestor and intestate of the plaintiffs, in his lifetime, to recover a strip of land about twenty rods wide by seventy

rods long, being the easterly end of a farm known as the "Cross-lot," with damages for withholding the same. Plaintiffs claimed that the easterly boundary of their farm is a fence which was erected in 1812 by one T., who was then in possession, and that he cultivated the land up to the fence. The evidence showed that the fence was erected to protect a crop of wheat which T. had planted upon the land in controversy, and that this land continued until in 1866 in the actual possession of T. and his grantees as part of the Cross-lot farm, and that for upwards of fifty years the adjoining owner had occupied up to the fence. In 1820 the fee of the farm was conveyed to T. by a deed which described it as then in the possession of T., and stated the easterly boundary to be "the east line of the Montessor Patent, as the same ought to be established." It was also proved on the part of the plaintiffs that in 1844 one V. O. owned the Cross-lot farm and lived on it, and one B. owned the farm now belonging to defendant, and was in possession of it seven years. That each agreed to keep one-half of the fence in repair and did so. In 1866 defendant tore down the old fence and erected a new one to the westward of it, on what he claims to be the true line of the Montessor Patent, cutting off the land in dispute. Defendant proved that the new fence was on the true easterly line of the Montessor Patent. Plaintiffs contended that the division line had been established by practical location, and the old fence must be regarded as such line, whether on the true line of the patent or not. The complaint was dismissed on the ground that as the deeds under which the plaintiffs derived title, declared the easterly line of the farm to be the easterly line of the Montessor patent, as the same "ought to be established." This was an admission that the line was not established, and by implication, that the fence was not on the true line.

R. L. Hand for applt.

Robert S. Hale for resp't.

Held, error; that the evidence of acquiescence in the fence as a boundary line should have been submitted to the jury; that the jury might have found from the evidence a practical location of a line between the two farms, and a possession of more than twenty years in pursuance of such location.

On the trial V. O. was interrogated as to conversations with one B., and denied that B. had ever claimed that the fence was not on the true line. B. was afterwards called and testified to a particular conversation with V. O. as to whether the fence was a division fence. V. O. was then recalled by plaintiffs, and they offered to disprove by him the alleged conversation with B., and to contradict B. in that respect. Defendant objected on the ground that V. O. had been fully examined. The objection was sustained and exception taken. Defendant urged that the effect of the acts of acquiescence proved was destroyed by this evidence of B.

Held, That the court in excluding the re-examination of V. O. must have assumed that such evidence had been in substance denied by V. O., otherwise the refusal was error, and if denied it was a question for the jury.

Judgment of General Term reversed, and new trial ordered.

Opinion by *Rapallo, J.*

NEGOTIABLE PAPER.

SUPREME COURT OF PENNSYLVANIA.

Young & Worth v. Shriner.

Decided February 7, 1876.

It is not competent for the maker of a promissory note to set up, as a defense to a suit by an endorsee for value after maturity, any equities existing between the maker and an intermediate endorsee. not connected with the transaction between the original parties.

Error to Common Pleas of Union county.

Assumpsit by Shriner on a note drawn May 11, 1871, at three months, by the firm of Young & Worth to the order of G. W. Minsker, and by him endorsed to R. T. Barber for value before maturity. Barber was one of the firm of Young & Worth, which firm became insolvent before the maturity of the note, and was dissolved; a bill for an account was filed and a receiver appointed. The note was not paid at maturity, and was duly protested. In May, 1873, Barber endorsed it to Shriner, who brought suit on it in the court below. It did not appear that Barber was personally insolvent. The note had been discounted by Barber out of his own funds, and there was no evidence that Shriner knew that Barber was a member of the firm.

Upon the trial the plaintiff, after proof of the note, offered it in evidence; the defendants objected on the ground that Shriner, being an endorsee after maturity, could not sue on it in his own name. Objection overruled, and note admitted.

The defendants offered to prove that Barber was a member of the firm of Young & Worth, and that the partnership had become insolvent, and had been dissolved before the maturity of the note, which offer was refused.

Verdict for the plaintiff and judgment thereon, to which defendants took the writ, assigning for error the admission of the note in evidence, and the rejection of defendant's offer.

Held, The note is admitted to have been good in the hands of Minsker, the payee, and was taken from him by Barber for a full consideration paid out of his individual funds. Though Shriner took the note after it was overdue and protested, it was without notice that Barber was a partner of Young & Worth. There was nothing to put him on his guard, and no want of consideration or of equity to af-

fect his right of recovery. The general state of the accounts of the partnership was, therefore, not a ground of defense.

Judgment affirmed.

Per Curiam opinion.

PRACTICE. NEW TRIAL.

N. Y. COURT OF APPEALS.

Boos, respt. v. The World Mutual Insurance Company, applt.

Decided February 22, 1876.

Whether or not a disease is "serious" within the meaning of a life insurance policy is a question of fact for the jury.

The General Term has no power to set aside a verdict as against the weight of evidence upon an appeal from the judgment only. A motion for that purpose can only be made at Special Term or Circuit, and must be brought up on an appeal from the order thereon.

This was an action upon a policy of life insurance brought by plaintiff as assignee thereof, and to recover back an annual premium paid by said assignee after the death of the assured, but before it was known to plaintiff or defendant. The defence was a breach of warranty in that that the deceased answered falsely certain questions in the application. Among others were two questions, one whether he had had any of certain specified diseases, "or any serious disease," and another whether during the last seven years he had had any severe sickness or disease, both of which were answered in the negative. The application was made in 1870, evidence was given that in 1865 the deceased had an attack of pneumonia which lasted ten days, and that in 1863 or 1865 he had a sun stroke which laid him up for a few days. Neither of these diseases were mentioned in said questions. Defendant's counsel moved for a non-suit on the ground that the answers to these questions were proved false. This was de-

nied, and the court submitted the case to the jury, charging that if the assured answered falsely any question in the application, whether he knew this answer to be false or not, the policy was void.

John H. Bergen for respt.

Joshua M. Van Cott for applt.

Held, That the refusal to take the case from the jury was not error, that it was a question of fact for the jury to determine whether the diseases proved were severe within the meaning of the policy, and whether the sunstroke was within seven years.

A motion was made for a new trial on the judge's minutes, which was denied.

Defendant claimed that the General Term erred in holding that it could not set aside the verdict as against the weight of the evidence, the appeal being from the judgment only.

Held, no error: That the appeal brought up questions of law only (Code, § 348); that the only mode in which the General Term could acquire jurisdiction to review a case upon the facts when the trial is by jury, is by an appeal from an order granting or refusing a motion for a new trial on the evidence, which can only be made at the Circuit or at Special Term. (Code, § 265.)

On trials by jury the only subjects of exception are rulings at the trial. A motion for a new trial is a proceeding subsequent to the trial, and an order made thereon is reviewable only by appeal.

Judgment of General Term, affirming judgment for plaintiff on verdict, affirmed.

Opinion by *Rapallo, J.*

PRACTICE. AMENDMENT.

N. Y. COURT OF APPEALS.

In re Petition of *Ingraham*.

Decided February 25, 1876.

Upon a proper showing this court will order its remittitur amended so as to state that the order of affirmance

is without prejudice to an application by the appellant to the court below to re-open the case.

This was a motion by the petitioner for the amendment of the remittitur so as to allow him a re-hearing in the court below, or to renew his application (which was to set aside an assessment) on further proofs. The motion was founded upon affidavits to the effect that the defect of proof upon which this court based its judgment of affirmance could be supplied, and that the point upon which the case was decided in this court was not taken in the court below. The case was decided in the court below on the ground that the land claimed by the petitioner, and through which a sewer had been constructed, had been dedicated to the public. When the case came to this court the point was taken that the proofs failed to show that any part of the sewer was on the land claimed by the petitioner, or that the owner of the land had not consented to its being placed there. This point was found to be well taken, and the question of the dedication of the land as a street was not raised or passed upon by this court.

Held, That it is beyond the province of this court to grant the amendment desired, but as it is proper that the petitioner should have an opportunity to put his case in such shape as that the question of dedication may be passed upon, ordered that the remittitur be amended so as to show that this question was not passed upon, and to state that the affirmance of the order is without prejudice to an application by the appellant to the court below to re-open the case and allow the parties a rehearing on further proofs, or, if the petitioner desires, to a new application.

Per curiam opinion.

LIEE INSURANCE. AGREEMENT.
N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Shaw, *respt.* v. The Republic Life Insurance Company, *applt.*

Decided January, 1876.

An agreement to issue a policy of life insurance is good, although the premium was paid by note, and the note was not paid at maturity, where the policy contains no condition avoiding policy unless the note is paid.

In 1868 the Hahneman Life Insurance Company insured the life of plaintiff's husband for \$2,000, and the policy was for plaintiff's benefit, and up to September, 1872, plaintiff's husband paid the premiums thereon, when, in that year he neglected to pay, and the policy, by its terms, lapsed. In the fall of 1871 the Hahneman Life Insurance Company sold out to defendant, and defendant reinsured all their risks.

In November, 1872, after plaintiff's policy had lapsed, M. & DeV., a general and local agent of defendant, called at the house of plaintiff's husband and wanted him to take a new policy in defendant, saying that they were engaged in taking up old policies in the H. Co. and reissuing, new ones in defendant. M. told plaintiff's husband that his policy in the H. Co. had lapsed, and that he would try and get defendant to issue a new one, and plaintiff's husband then gave M. his note for \$56.00, and signed an agreement, forms for which M had, as follows, viz:

"Received November 26, 1872, of R. B. Shaw, policy No. 2,705, issued by H. Co., &c., now in force, dated, &c., for amount \$2,000, annual premium payable on September 8, each year, in exchange for which the R. Co. (defendant) will issue its policy of same amount and deliver same in a reasonable time, and in the meantime keep the insurance good.

F. E. M.,

Special Agent, &c."

The insured, S., then gave M. his note for \$56.00.

The defendant's policy was a few days

later sent to De V., in pursuance to above. De V. refused to deliver same to plaintiff or her husband, and plaintiff and her husband offered to pay the note. The insured at this time was sick, and in the fall of 1873 died of consumption.

There was a judgment for plaintiff for \$2,000, &c.

M. was the general agent for defendant in this State, and was particularly engaged in taking up the old H. & Co. policies.

Lyman & James for applts.

E. W. Gardner for respt.

Held, That the agreement above was properly considered by the judge at circuit as constituting an agreement binding upon defendant to issue to Shaw a new policy. Such an agreement constituted in and of itself in legal effect from its date a policy of insurance, or imposed upon the defendant the duty of issuing a policy thereon in proper form. It had no connection with the H. Co. policy. The old policy may have constituted an inducement, but not in any sense a consideration. The consideration for the new policy was the note of S., and it must be held that this note was received in payment of new premium. This note was made at the same time as the agreement, and was not given for any pre-existing debt.

That the non-payment of the note at maturity did not avoid the policy. The contracts were independent of each other. The defendants had an ample remedy at law upon the note, and it appears that payment of the note was tendered to defendant's agent, who had the same for collection.

There was no clause in the policy that the same should be void, unless the note was paid, hence policy was not void.

Judgment affirmed.

Opinion by *Smith, J.*; *Mullin, P. J.*, and *Gilbert, J.*, concurring.

MECHANICS' LIEN.

N. Y. SUPREME COURT, GENERAL TERM—
FOURTH DEPARTMENT.

Nellis, respt., v. Bellinger, applt.

Decided January, 1876.

When the owner of land permits the construction of a building on his land occupied by another, and for another's benefit, the statute permits a lien by a mechanic or person furnishing material.

One B. was the owner in fee of 40 acres of land, and about 15 years ago gave to his son the use of said 40 acres so long as he should use same and pay taxes. The son proceeded to erect a dwelling house thereon, and plaintiff performed work on the house and thereafter regularly filed a mechanic's lien thereon for such labor.

The father, B., it was proved, lived near the house in question, frequently assisted in its construction, knew that plaintiff was working on it, and in fact was around the house nearly every day. The son made all the contracts for labor in his own name, &c., and the son hired plaintiff and plaintiff charged his labor to the son.

There was a judgment for the plaintiff.

Earl, Smith & Brown for applt.

J. A. & A. B. Steele for respt.

Held, That the evidence clearly shows that defendant was willing and consented to the construction of the house on his land and this was a sufficient consent under the statute, and the fact that the defendant gave such implied consent under an impression that there was no liability on him made no difference. His mistake of law cannot affect the rights of others.

That the statute now gives a lien as well where the owner of land consents to the erection of a structure upon it as when he contracts directly for its construction, and the consent of such owner may be proved by the fact that he entered into such contract or by other acts and circumstances as well as

by direct evidence. One who takes the benefit of the labor or property of another in improvements on his land subjects the land to a lien for the value of such labor or property.

That it is not necessary that the consent required by the statute should have entered into the consideration or in some way induced the acts of lienor. The statute contains no such qualification.

Judgment affirmed.

Opinion by *Gilbert, J.; Mullin, P. J.* and *Smith J.*, concurring.

AGENCY.

N. Y. SUPREME COURT—GEN'L TERM
FOURTH DEPT.

Merchants' Bank, respt. v. The Meyers Steel and Wire and Iron Co., applt.

Decided January, 1876.

Where a contract is signed by "the cashier," and it is found that he so signed under the direction of the president of the bank, and his act purported to be on behalf of the bank, the bank is bound.

A party cannot avoid his agent's acts as to part of a transaction and avail himself of them as to the residue.

This was an action on a note.

On the trial an agreement dated Sept. 28, 1870, made simultaneously with the note in suit and signed by the cashier of the bank as "J. F. M., Cashier," was offered in evidence and rejected on the ground that J. F. M., Cashier, could not bind the plaintiff.

The real contract or agreement related to the note in suit, and as defendant claims, controled as to terms of payment and time, &c. It was signed at the same time the note was, and was signed by order of the president of plaintiff. There was judgment for plaintiff.

C. G. Myers for applt.

B. Winslow for respt.

Held, The contract dated September

28th, 1870, was rejected solely upon the ground that the signature to it of "J. F. Moffatt, Cashier," did not bind the bank. This was error. It was proved that Moffatt was Cashier of the bank, and that the contract was signed by him by the direction of the president of the bank, in the course of the transaction in which the bank became the owner of the note. His act purported to have been done on behalf of the bank, and is binding upon it, upon the ground that it was within the scope of the authority conferred upon him (*Bank of Genesee v. Patchen Bank*, 19 N. Y., 312), and because, also, the bank necessarily ratified the whole transaction by availing itself of the note which formed a part of it. A party will not be permitted to avoid his agent's negotiations as to part of a transaction, and disavow them as to the residue. (*How. on Fraud*, 144; *Story on Ag.*, § 250.)

The judgment must be reversed, and a new trial granted, with costs, to abide the event.

Opinion by *Gilbert, J.; Mullin, P. J.*, and *Smith, J.*, concurring.

SUMMARY PROCEEDINGS.

N. Y. SUPREME COURT—GEN'L TERM.
FIRST DEPT.

Paine, respt. v. The Rector, &c., of Trinity Church, applt.

Decided March 6, 1876.

Covenants in a lease that if lessee keeps his covenants lessor will, at expiration, pay lessee value of any buildings that he may erect on demised property, do not prevent lessor from instituting summary proceedings against lessee for non-payment of rent.

Appeal from order at Special Term continuing injunction.

Defendants, in 1812, leased certain lots of land in New York City to Jacob de la Montague for sixty years, granting to the

lessee the privilege of removing all materials or any buildings within ten days after the expiration of the term, but not at any time thereafter.

At the expiration of the term in 1872, the lots were let to plaintiff by two leases, at a yearly rent amounting to \$12,500, subject to the lawful rights of all persons claiming under the former lease to De la Montague. Each lease contained a proviso for re-entry for non-payment of rent, also a clause to the effect that if the lessee erects buildings thereon, only such as are allowed by the law in respect to buildings within the fire limits of the city, and "shall, during the whole of the said time, well and faithfully keep all and every the covenants and agreements herein contained," then, at the expiration of the term, the lessor will pay the full valuation of the buildings standing on the lots, or grant a new lease.

On the 1st of May, 1875, six months rent became due, but was not paid, and on the 29th of May, 1875, resort was had to summary proceedings under "The Landlord and Tenant Act," to remove the lessee (plaintiff herein). Plaintiff brings this action to restrain defendants from further prosecuting the dispossession proceedings. Plaintiff claims that the buildings now on the lot are worth \$40,000. Plaintiff has neither paid, nor offered to pay the rent, since the same became due.

The court, at Special Term, granted the injunction.

C. Fine for resp't.

S. P. Nash for applt.

¶ On appeal. *Held*, That the real question in this case is, whether the provisions of the lease in respect to the payment by defendants to plaintiff, at the end of the term of the full value of the buildings, which may be then on the lots, and in respect to the granting of new leases of the lots, can have the effect of taking the case out of the statute authorizing summary proceedings, and compel the landlord to

resort to an action for rent or to ejectment.

Plaintiff defaulted in the payment of his rent, and so failed to perform the covenants of the leases. He continued his default until, by the terms of the leases, the right of re-entry had accrued.

Defendant is seeking to enforce the remedy given him, as landlord, by the leases, upon the occurrence of such default.

The statute gives the right to proceed summarily against a tenant for years, whenever he holds over without permission after default in the payment of rent.

It is difficult to see why the process is not applicable to this case.

The fact that by the covenants of the lease the plaintiff may have certain favorable rights at the expiration of the term, some eighteen years hence, cannot be urged as an excuse for the breach at the present time of the principal covenant on his part, or as a legitimate reason why the landlord should not be allowed the remedies provided for him by statute.

And such rights of plaintiff depend altogether upon the faithful performance of his covenants.

It is difficult to see how his present refusal to pay the rent due puts him in a position to enforce the covenants of his landlord, which are to be performed *in futuro*, and then only upon plaintiff having kept the covenants, which he admits he has broken.

The length of the term of the leases furnishes no suggestion against the summary remedy, they are still leases for years.

The right to re-enter reserved in the leases is not subject to any adjustment for the value of buildings or improvements upon the lots, but accrues upon a default of ten days in the payment of the rent, and is then absolute, and may be enforced independently of any of the provisions of the lease in respect to renewals or compensation at the end of the term.

The tenant's remedy in this case is to pay the rent before the order of dispossession is issued, or redeem under the statute after his removal. (Laws of 1842, p. 293.)

Order reversed and injunction dissolved.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

ATTACHMENT. NATIONAL BANKS.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Southwick, respt. v. First National Bank of Memphis, applt.

The restriction in section 57 of Act of Congress of 1864, as amended by section 2, chapter 269 of laws of Congress, 1873 (3d Session), as to issuing attachment, execution or injunction, before final judgment against national banks, does not relate to such banks as are located in other States than that in which the suit is brought, but to those that are within such State.

Appeal from order made at Special Term denying motion to vacate an attachment.

Plaintiff, at the beginning of this action, obtained an attachment, and under it levied upon certain moneys, in one of the New York banks, belonging to defendant.

Defendant is a national bank located and doing business in Memphis, Tennessee, and moves to vacate this attachment on the ground that it is in violation of section 57 of the National Banking Act of 1864, as amended by section 2 of chapter 269 of the laws of Congress of 1873 (3d session.)

This act as amended provides, "That suits, actions and proceedings against any association, under this act, may be had * * * in any State, county, or municipal court in the county or city in which said association is situated, having jurisdiction in similar cases." * * *

And provides further, "That no attachment, injunction or execution shall be issued against such association, or its property, before final judgment in any such suit, action or proceedings, in any State, county or municipal court."

The court below, on the authority of *Cook v. The State National Bank* (52 N. Y. 96), refused to vacate the attachment.

Jno. E. Burrill for respt.

Francis D. Barlow for applt.

On appeal. *Held*, That it has been substantially decided by the Court of Appeals (52 N. Y. 96), that section 57 of act of 1864, did not intend to take away the general jurisdiction of the State courts over corporations, created under the National Banking Act, wherever they may be located.

We are not asked to disregard that decision, but to hold that Congress has power, notwithstanding the general jurisdiction of the State Courts, in suits against such banks, to enact that no attachment, &c, shall be issued before final judgment against such banks or its property, and that the amendment of 1873 to section 57 has imposed such restriction.

This amendment as to attachment, &c., was probably made on account of the national banks having become liable to attachment as foreign corporations, in accordance with the decisions of the courts of this State, owing to the peculiar definition of our code (sections 227 and 247).

This amendment should be construed with an eye to the evil sought to be avoided, and not that it was intended to take away the ordinary and often the only process by which an action can be brought in our State Courts against a banking association situated in another State.

The prohibition is only to "*any such suit, action or proceedings*," and we find that the word "*such*," so far as State, county, or municipal courts are considered, relates only to suits "*in the county or city in which such association is located*," and it is only "*in any such suit, action or proceedings in any State, county or municipal court*" that the proviso forbids the issuing of an attachment, &c. This seems the plain construction of the language used. If suits may be brought against National Banking Associations located in other States, as held in 52 Y. N. 96, then such suits may be commenced by the process of attachment.

The prohibition as to National Banking Associations located within the State may be wise and salutary, as these may be proceeded against by the ordinary personal process of our courts—but as to such as cannot be reached by personal process, Congress has left intact the remedies provided by our State laws.

Judgment affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

NEW YORK WEEKLY DIGEST.

Vol. 2.] MONDAY APRIL 17, 1876. [No. 10.

BILL OF LADING.

SUPREME COURT OF PENNSYLVANIA.

Henry v. The Philadelphia Warehouse Company.

Decided February 21, 1876.

A broker who comes into possession of goods without the knowledge or consent of his principal, ships the goods and takes a bill of lading, may by endorsement transfer the title to a bona fide pledgee, under the laws of Louisiana.

Error to the District Court for the City and County of Philadelphia.

Replevin by Henry to recover twenty-one bales of cotton in the possession of the defendants. Pleas: "Property in the defendants," and "property in the Crescent City Bank of New Orleans." Replication and issue.

The plaintiff's evidence was, that, being in New Orleans in April, 1872, he went to one Vaudry, a cotton broker, who took him to Foster & Gwyn, cotton factors. From them he bought twenty-one bales of cotton, for which he paid the same day, taking a receipt (which was in evidence) dated April 13, 1872. He then returned, leaving the cotton with Foster & Gwyn, who said they would see it shipped. Vaudry afterwards, without the plaintiff's consent or knowledge, took the cotton into his own possession, shipped it to the plaintiff, and having taken to himself the bill of lading therefor, drew on the plaintiff on May 1, 1872, for nearly the whole price of the cotton. He then fraudulently endorsed the bill of lading to the bank, and attached it to the draft. The plaintiff refused to pay the draft, whereupon the bank took possession of the cotton, and stored it with the defendants, from whom it was replevied.

Gwyn (a member of the said firm of

Foster & Gwyn) being called by the plaintiff, testified that his firm had dealt in the matter with Vaudry alone, as the plaintiff's broker.

The defendants offered in evidence the following letter, as tending to show that Vaudry had authority to ship the cotton:

NEW ORLEANS, April 27, 1872.

Mr. Thomas Henry:

Yours of the 20th received. The reason why you have not received the bill of lading of the 21 b. c. was that the steamer for Philadelphia was full, and I could get no freight. I will ship your 21 b. c. on the steamer Liberty via Baltimore. She leaves on Thursday evening.

J. VAUDRY, Jr.

Admitted under objection, and exception to the plaintiff.

The court (*Hare, P. J.*) charged the jury: "If you find from the evidence that Vaudry had possession of, and actually shipped the cotton, received a bill of lading therefor, and endorsed it to the bank, who took it in good faith, your verdict should be for the defendants."

Verdict for the defendants, and judgment thereon.

The plaintiff took a writ of error, assigning for error the admission of the letter, and the charge of the court.

The Louisiana statute (Revised Stats. §§ 2482, 2485) making bills of lading negotiable provides that—

A bill of lading may be transferred by endorsement thereon, and that the party receiving such transfer shall be regarded as the owner of the property named in the bill, so as to secure any pledge or lien made thereof to him. Also, that "all receipts, bills of lading, vouchers, or other documents issued by any cotton-press owner, wharfinger, forwarder, or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by endorsement in blank or by special endorsement, in the same manner and to the same

effect as bills of exchange and promissory notes now are.

Held, 1. This case is governed by the Statute of Louisiana, where the transaction took place.

It is clear, from the evidence, that Vaudry, who shipped the goods and took the bill of lading, was in actual possession of them by delivery from the factors. His possession gave him an apparent control over them, and he thus shipped them and took the bill of lading to himself. He thus had all the *indicia* of property or power over the goods when he endorsed the bill of lading. Under these circumstances and by the operation of the statute, he stood in a position to transfer the property in the goods to a *bona fide* pledgee for value and without notice.

2. The letter was a minute but not immaterial part of the *res gesta*, and its reception no error.

Judgment affirmed.

Per curiam opinion.

MARRIED WOMAN. CHARGING SEPARATE ESTATE.

SUPREME COURT OF MISSOURI.

The Metropolitan Bank v. Lucy G. Taylor *et al.*

Decided January Term, 1876.

A married woman is incapable of making a contract except in regard to her separate property, but in reference to that she is treated as a femme sole; and if she gives a note, the law implies, in the absence of proof to the contrary, that she intends to bind her separate estate. It may appear that there was no intention to bind the separate estate, but the intention must be manifested from the contract itself and cannot be shown by parol testimony.

Appeal from St. Louis Circuit.

This was a suit brought for the purpose of charging the separate estate of the defendant, Lucy G. Taylor, with the pay-

ment of a promissory note which she signed in conjunction with her husband. A judgment was rendered in favor of the plaintiff, subjecting the property specifically to the satisfaction of the demand.

At the trial the defendant admitted that she signed the note, and testified that it was done at the request of her husband; and that she received no part of the consideration and did not know for what purpose the note was made. She was then asked what connection the note had with her separate estate, but the question was objected to by the plaintiff and the objection was sustained. She was also asked if she knew that she had a separate estate, but this question was ruled out. The further inquiry was put whether by signing the note she intended to bind her separate estate; but the court excluded the question.

The law in reference to married women binding their separate estates has been so long established in this State that it has become a rule of property and cannot now be shaken.

A married woman is incapable of making a contract except in regard to her separate property. But in reference to that she is treated as a *femme sole*, and if she gives a note the law implies, in the absence of proof to the contrary, that she intends to bind it. It may appear that there was no intention to bind the separate estate, but the intention must be manifested from the contract itself, and cannot be shown by parol testimony. The intent that the separate property should not be bound, to be of any importance, should be a part of the contract; that is to say, that the writing or contract should show on its face, when properly interpreted, that no charge upon the separate estate was intended to be created.

The court, therefore, did not err in ruling out the testimony which was offered for the purpose of showing that the defendant signed the note with an inten-

tion different from that implied by law. As the defendant, when she signed the note, possessed separate property, the law presumes that she intended to render that property liable for the satisfaction of the obligation, and as nothing different appears from the contract itself, the judgment should be affirmed.

Judgment affirmed.

Opinion by *Wagner, J.*

AWARD.

N. Y. SUPREME COURT, GENERAL TERM FIRST DEPARTMENT.

In the matter of the application of the Department of Public Parks to lay out a public drive from 155th street.

Decided January 28, 1876.

No award can properly be made for other than nominal damages for the taking of land for public use, which has already been dedicated by a former owner to such public use.

Where commissioners, in ignorance of the fact of a former dedication, award damages to unknown owners, the court especially, where all the parties are before it, may correct the error.

Appeal from order of referee declaring George B. Grinnell entitled to an award made to "unknown owners."

The commissioners of estimate and assessment, for laying out a road or public drive northward from the southerly line of 155th street to the intersection of the Kingsbridge road, with Inwood street, in the City of New York, awarded for a part of the land taken for the purpose indicated, and to unknown owners the sum of \$1,547. The land formed a part of 157th street. This award was claimed on the one hand by George B. Grinnell, and on the other hand by John Dalley. Dalley's title was derived through a deed dated December 9th, 1853, bounding the premises conveyed by the northeasterly side of 157th street, and Grinnell asserted

is ownership under a deed executed by the widow and devisee of Dennis Harris, dated December 13th, 1868, by which she conveyed to him the street in front of Dalley's grant or the *locus in quo*. The disputed territory was never used as a street. It was enclosed by Dalley, although he had from his deed notice that it had been dedicated to the public use as a part of 157th street. The referee found in favor of Grinnell, and it seems, upon the propositions, that it was covered by the grant of Mrs. Harris and that there had been no adverse possession by Dalley.

The referee found that the *locus in quo* had been dedicated to either public or private use as a street, and only a nominal award should have been made for it by the commissioners. The dedication of the land as a public street was made by the grantor, through whom both disputants derive title, namely, Dennis Harris.

Josiah Parker for Grinnell.

Henry Woodruff for Dalley.

Held, That the appropriation of the land thus made entitled the owner of the adjoining land to nominal damages only. Harris' grant was to the line of the street, and any subsequent conveyance of the bed of the street to the centre of it, or the whole of it, if owned by his grantor, would confer no right upon the grantee to demand or receive any compensation for it from the city. The language of the conveyance to Dalley constituted a dedication of the land as a street to the public use, and its employment for that purpose authorized the grant of nominal damages only.

The commissioners made the award in ignorance, doubtless, of the dedication, and if not of that fact certainly in ignorance of the law. This may justly be assumed, but if not then this court *ex debito justitiæ* can correct the error into which they have fallen. This power cannot be questioned, and should always be employed in a case like this, where the award is

general, to unknown owners, and not specific, in order to prevent a palpable wrong particularly when all the parties interested, as in this matter, are before the court.

Order made at Special Term should be reversed, and the proceedings remanded to the court below to be disposed of according to this opinion. No costs of this appeal to either party.

Opinion by *Brady, J.; Davis, P. J., and Daniels, J.*, concurring.

COMMISSIONERS.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Walter R. Wood and Charles P. Williams, *appls.*, v. The Mayor, &c., of New York

Decided March 6, 1876.

Commissioners appointed by and in pursuance of an act of the legislature for a particular purpose, viz.: to erect a court-house in one of the judicial districts in the city of New York, and having no corporate or continuous power, are agents of the city; and, the city is liable for expenditures made by them in the prosecution of the work.

The remedy in such case is by action, and not by mandamus.

Appeal from a judgment dismissing the complaint, and directing exceptions to be heard in the first instance at the general term, and from order denying a writ of mandamus.

Plaintiffs furnished materials for the erection of a court-house in the third judicial district, upon the purchase thereof by a commissioner appointed under an act of the legislature, chap. 202, laws of 1870, and the two police justices holding court in said district, who, under said act, constituted a commission to build said court house. Defense, that the appropriation for said building was wholly paid out, and expended, and that defendants had, in an

action brought for that purpose, been enjoined from paying any expenditure or liability incurred by said commissioners.

The complaint was dismissed, it was said, on the authority of *Maximillian v. the Mayor*, 9 N. Y. Sup. Ct. Reports, 263.

Held, That the commissioners were not independent of the city government but its agents specifically designated for a particular purpose to act in their behalf. In the case of *Maximillian v. the Mayor*, the action was to recover damages for injuries received by plaintiff's intestate by a subordinate of the board of health. Then the entire management and government was confided to the commissioners, and the court held the subordinates the agents of the commissioners, and not of the city. In this case the commissioners were to locate and erect a building for and on behalf of the city as its agents, having no corporate or continuous power. The commissioners acted for the city, and the city is liable for the expense incurred.

A motion was also made for a mandamus and properly denied, because the remedy was by action. The result of the review, therefore, is that the judgment be reversed and a new trial granted with costs to abide the event, and that the order appealed from be affirmed with \$110 costs, and disbursements to be adjusted upon the termination of this action.

Opinion by *Brady, J.; Davis, P. J. and Daniels, J.*, concurring.

REVIVOR AND CONTINUANCE.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

In the matter of the last will and testament of James Foster, Jr., and the petition of Mary E. Whittlesey.

Decided March 6, 1876.

A proceeding by petition against a former trustee to open an order by which he was discharged as trustee under the statute, on the ground of

gross mismanagement and violation of duty while acting as trustee may be revived against his representatives in case of the death of such former trustee pending such proceedings.

Appeal from order directing the representatives of Anthony L. Hoguet, deceased, to be made parties, &c.

Anthony L. Hoguet was one of the trustees to carry out the provisions of the will of James Foster, Jr., and while acting as such trustee he presented his petition to be relieved from the trust, and such proceedings were had that the prayer of his petition was granted. Some time after the order to that effect had been entered, Mary E. Whittlesey, the *cestui que trust* under the will, applied to have the proceedings by which Hoguet was discharged, opened upon allegations of an abuse of his trust in making improvident and improper investments in respect of which she claimed an accounting. On the application an order of reference was made to ascertain and report the facts. Pending the reference, and while the investigation under it was proceeding, Hoguet died and the *cestui que trust*, Mrs. Whittlesey, applied to have the representatives of his estate brought in as parties to the proceeding by an order of the court, which should revive and continue the proceeding for that purpose. The order was granted, and the executrix of Hoguet brings this appeal from the order.

The proceedings by Hoguet for his discharge from the court was by petition under the provisions of the Revised Statutes, and the proceeding upon the part of Mrs. Whittlesey to open the order and investigate the allegations upon which she asked it to be done, was by petition.

It was urged by the appellants that the death of Hoguet arrested the proceedings and deprived the court of all powers to continue it. That the statute remedy was personal, and the person was withdrawn by the death of Hoguet.

Joshua M. Van Cott for applt.
Albert Cardozo for resp't.

Held, The direct object of the proceeding was to establish a personal liability against Hoguet, growing out of the alleged mismanagement of the trust, and the order of the court stood across the path of that proceeding. It was a complete answer to the claims and allegations of the *cestui que trust*, while it stood intact as a record of the court. The equity powers of the court were broad enough to entertain a direct application on broader grounds than would uphold a suit to avoid the discharge for fraud; and it was not at all necessary to require the *cestui que trust* to resort to an action. In entertaining the application and directing the reference to ascertain the facts, the court acted within its clear equitable powers, and the *cestui que trust* acquired rights in the proceeding of which she ought not to be deprived by the death of Hoguet. The proceeding directly affected his estate, which by his will is now in the hands of the executors. It is not perceived that any sound reason exists why the proceeding should not be continued. If sufficient facts are established upon the reference to call for the opening of the order it certainly ought not to stand with the force of a judgment to protect the estate of Hoguet from just liability to the *cestui que trust*. It is very true the provisions of the Code and of the statute touching the revivor of suits are in strictness applicable to actions *eo nomine*. But that does not deprive the court, we think, of its equitable powers over this proceeding to bring in the representative who has become interested in the question.

Order affirmed, with \$10 costs.

Opinion by Davis, P. J.; Daniels, J., concurring. Brady, J., dissents on the ground that this proceeding to disturb the order discharging Hoguet is not an action, and therefore not embraced within the provisions of the Code with reference to

rev. vor against representatives of a deceased party, which provision applies to actions only, and that the court has no jurisdiction to bring in the representations of Hoguet in this proceeding.

DISCHARGE OF MORTGAGE BY JUDICIAL SALE.

SUPREME COURT OF PENNSYLVANIA.

Wright v. Vickers, admr. of H. P. Montgomery, with notice to James Goodchild et al, terre-tenants.

Decided March 30, 1876.

A sale in partition discharges a mortgage made by one of the co-tenant upon his interest. The act of March 20, 1867, does not prevent this.

Error to the Court of Common Pleas of the city and county of Philadelphia.

This was a *sci. fa.* on a mortgage given by H. P. Montgomery, who was a co-tenant with other parties of certain real estate on South Broad street. The affidavits of defense stated that prior to the execution of the mortgage a writ of partition had been issued, and after the delivery of the mortgage a judgment *quod partitio fiat* was entered and sale of the premises had been duly made thereunder. The court below held the affidavits sufficient, and then the plaintiff sued out this writ of error.

The act of 20th of March, 1867, contains a provision that the lien of a first mortgage shall not be destroyed or in any way affected by any judicial or other sale whatsoever, whether such judicial or other sale shall be made by virtue or authority of any order or decree of any orphans' or other court, or of any writ of execution or otherwise whatsoever. Here, lands in the ownership of several tenants in common have been sold under proceedings in partition of the Court of Common Pleas. The undivided interest of Hardman Phillips Montgomery, one of the co-tenants, was

subject to the lien of a mortgage, on which the plaintiff, as assignee, has brought suit against the purchasers as terre-tenants. The single question raised is, whether by the operation of the act of 1867, the lien of the mortgage was divested by the sale.

Held, That the sale in partition discharged the lien of the mortgage; that by due process of law all rights of the mortgagor in this land have been extinguished. In due legal form their exact equivalent in money has been obtained. This money is the measure of the value of the mortgagor's land on the one hand, and of the extent of the mortgagee's lien on the other. Certainly there can be no hardship in a legal rule that gives to a creditor the entire property which he has accepted as the security for his debt.

The order of the Court of Common Pleas discharging the rule for judgment for want of a sufficient affidavit of defense is affirmed.

Opinion by Woodward and Paxon, J. J.; Agnew, C. J. and Sharswood, J., dissenting.

USURY. SUBROGATION.

N. Y. COURT OF APPEALS.

Paterson, *resp.*, v. Birdsall and wife, *appls.*

Decided Feb. 25, 1876.

Where a valid, subsisting mortgage has been formally satisfied and discharged, and the amount thereof included in a new mortgage which embraces other amounts, and the latter mortgage is declared invalid as being usurious, the former mortgage revives and the mortgagee in the second having paid off the first, upon having his mortgage declared void for usury, is entitled to subrogation to the rights of the first mortgagee.

This action was brought to enforce the

subrogation of plaintiff to the rights of one T., under a mortgage of \$2,000 executed to him by defendants, dated May 14, 1849, which had been paid by plaintiff, who was a subsequent mortgagee, and who had a decree of foreclosure and sale upon his mortgage against defendants, for \$2,102.81. The premises were bid in for that amount by plaintiff, and were conveyed to him Oct. 30, 1858, and conveyed back to defendant's wife, Nov. 1, 1858, and she and her husband executed to plaintiff a mortgage for \$5,311.81, which included the amount bid at the foreclosure and sale, the mortgage to T., which plaintiff assumed, and \$1,000 in addition. May 17, 1859, plaintiff paid the T. mortgage and the interest thereon. In an action by defendants against plaintiff, the decree of foreclosure and sale, and subsequent conveyances, and the mortgage from defendants to plaintiff, were declared to be void and were set aside on the ground of usury. Defendants gave in evidence an instrument executed by plaintiff, dated Nov. 1, 1858, reciting that he had conveyed certain premises to defendant's wife, which were subject to a mortgage of \$2,000 and interest, and that defendant's wife had executed to plaintiff a bond and mortgage to secure the purchase money of said premises, and that said purchase money was understood to include the mortgage to T., which plaintiff agreed to pay off. The complaint alleged, and the evidence tended to show, that the T. mortgage was not to be satisfied, but was to be assigned and held as a lien on the premises until the payment of the mortgage to plaintiff. Defendant's counsel moved to dismiss the complaint. This motion was denied, the court holding that, although the money was advanced to pay the T. mortgage in pursuance of an agreement that was corrupt and usurious, plaintiff had the right to subrogation, and the mortgage was a valid lien in his favor, and directed judgment for the relief demanded in the complaint.

Geo. T. Spencer for resp't.

Geo. B. Bradley for appl'ts.

Held, no error: That a valid and subsisting debt is not destroyed because included in a security, or made the subject of a contract void, either because violative of the statutes against usury, or for other reasons, although formally satisfied and discharged, and the security has been surrendered, it may be revived and enforced in case the new security is invalidated and avoided. 5 Wend., 595; 36 N. Y., 520; 37 id., 353; 39 id., 325; 56 id., 214; 6 Seld., 189; that even if plaintiff, at the time of consummating the usurious agreement, had been the holder of the bond and mortgage in suit, and cancelled and surrendered it in pursuance thereof, it would have been revived upon the annulling of the usurious agreement and security, and he could have enforced the same, subject to any intervening equities of third persons that might have come into existence. *Dewitt v. Brisbane*, 16 N. Y., 508, and *Schroeppel v. Corning*, 5 Den., 236, distinguished.

Also Held, That plaintiff, as a junior incumbrancer, had a right to pay the mortgage and to be subrogated by assignment, or act and operation of law, to the rights of the mortgagee, in support of his equities, the usurious agreement may be laid out of view as the moving cause of the redemption, and the mortgage, as against the mortgagors, must be regarded as still existing. *Story's Eq. Jur.*, §§ 635, 1,227; 3 Barb. 534; 4 Seld., 44; 42 N. Y., 89; 12 How. Pr., 67.

Judgment of General term, affirming judgment for plaintiff, affirmed.

Opinion by *Allen, J.*

PROMISSORY NOTE. BONA FIDE HOLDER.

SUPREME COURT OF MAINE.

Roberts v. Lare.

Decided February, 1876.

The bona fide holder of negotiable paper can recover without regard to any fraud in its inception.

One who puts in suit a note shown to have been obtained from the maker by fraud, assumes the burden of establishing his own good faith. It is immaterial what the plaintiff's knowledge may be, if any prior owner whose rights he has was a bona fide holder of the note.

It does not affect the principles of law above stated, that the note was made to the maker's order and bore only his indorsement, if it is shown that in fact it was purchased by the plaintiff's predecessor in title, in good faith, and for value, of him to whom the maker first gave it.

The defendant made a promissory note February 15, 1871, payable to his own order in six months from date, indorsed it in blank, and passed it in payment of his subscription for some worthless stock, and he claimed that it was procured from him by fraud, in which Leavitt and Smith, the first known holders, were so far involved as to prevent them from sustaining an action upon it. No other name than the defendant's was upon the note.

The evidence shows that within five days after the note was made, it was offered with others of like character, amounting in all to something over \$9,500, for discount at the Eastern Bank, Bangor. The plaintiff is president of that bank, and also of the Penobscot Savings Bank, which is a large depositor at the Eastern Bank. The cashier of the Eastern Bank, who was also treasurer of the savings bank, testified that the Eastern Bank bought the note and paid Smith for it, less the reasonable discount agreed upon, by a check on the Eliot National Bank of Boston, which was credited with the amount of the check February 20, 1871; that there was no private agreement or understanding with Smith, and no entry of the note upon the books of the Eastern Bank; that neither Smith nor Leavitt

gave any reason for not indorsing the notes, nor were they asked to indorse them; that the cashier knew the law required two names, and it was not customary to discount without two; but that the bank had a surplus of money, the president liked the paper, and the cashier took it and placed it in the drawer as cash; that they took that course frequently to get interest for the Penobscot Savings Bank when it had a large amount on deposit in the Eastern Bank.

The defendant being called upon to pay the note to the Eastern Bank, refused, on the ground that it was obtained from him by fraud. The note lay in the bank drawer for a year, when the plaintiff, as he testified, having heard what the talk was about the paper, but regarding it as the duty of the officers to see the bank harmless, and as there was negligence on his own part in not having the notes indorsed, gave his check for the amount paid by the bank, and took the note as his own.

Held, 1. That the defendant's allegation of fraud in the inception of the note not having been traversed, the burden of proof is on the plaintiff to show that he has the rights of a *bona fide* indorsee; that he might do this by showing that he himself, or any prior holder whose rights he has, came by the note fairly for value before maturity without knowledge of the fraud.

2. That if any intermediate holder between the plaintiff and defendant took the note under such circumstances as would entitle him to recover against defendant, the plaintiff would have the same right, even though he may have purchased when the note was overdue, or with a knowledge of its infirmity as between the original parties.

3. It makes no difference that it was indorsed in blank by the maker, so that it passed by delivery and the title was apparently derived directly from him.

Judgment for plaintiff.

Opinion by Barrows, J.

CONTRACT. DAMAGES.

N. Y. SUPREME COURT, GENERAL TERM.
FOURTH DEPT.

Steele et al. *respts.*, v. Scott Lord *applt.*

Decided January, 1876.

In the absence of fraud or mistake the amount agreed upon between parties to a contract as to deductions for defects must stand, and the fact that they were unreasonable makes no difference.

Parol evidence of drafts lost or destroyed is admissible unless such loss or destruction was intentional and fraudulent.

Test applied as to what facts a referee should or should not find at request of parties.

This is an action on an account, was tried before a referee, and there was a judgment for plaintiff.

Defendant is a lawyer, and in 1869, he entered into a contract with plaintiffs to furnish them 6,000 sets of croquets at a certain sum per set, and subsequently a second contract was made for 2,000 sets at a less price.

The defendant in his answer sets up that he is a lawyer and had but little to do with the business, that when the first contract was made the plaintiffs, in order to induce defendant to enter into said contract, represented to him that they could procure from other manufacturers croquet sets of equal quality at as cheap rates as named in the contracts, that defendant relied on these representations, and that they were wholly untrue, and he claims damages for such false representations. The defendant also alleges the same false representations as to the second contract.

The defendant also alleges that he was at great expense in perfecting machinery to make croquet sets, and had to procure advances from plaintiffs in advance of the delivery of sets, and that when the second contract was made it was for the purpose of procuring further advances, and de-

fendant understood that plaintiff would make further advances for another year, and that by reason of his refusal so to do defendant was obliged to sell out at a loss of over \$10,000, and that owing to the failure to make advances as above, and also owing to unconscionable deductions on account of defective sets, defendant suffered the above loss.

The defendant, by his contract, allowed plaintiff to make deductions for defective sets but not to the extent claimed by the plaintiffs.

Some of the drafts used in business and in making up part of plaintiff's account, had been lost or disbursed, and the referee allowed secondary evidence of their contents under defendant's objection.

Held, That the defendant has no right to complain as to allowance for defective sets: they were made in pursuance of the very terms of the contract, and defendant in his answer admits that he consented to them but not to the extent claimed by plaintiffs. It was competent for the parties to agree as to the amount that should be deducted, and in the absence of fraud or mistake, the amount agreed upon must stand as the proper amount to be deducted, and as to this item no fraud or mistake is pretended.

That the loss or destruction of the drafts did not preclude plaintiff from recovering on them as lost or destroyed instruments. The loss which must preclude proof of the contents of a written instrument must be intentional and with the view of gaining an advantage by resorting to parol proof of their contents. Although the drafts were paid, parol proof of their contents under the circumstances, were admissible.

That, although defendant was a lawyer, &c., if he engages in business and in that business he enters into contracts, he is bound, unless fraud is shown. The refusal to make advances was no defence.

The referee was requested by defendant to find specific questions of fact and he refused.

Held, That the test by which to determine whether the referee should find the facts which he was called on to find is, are they material, or were they mere items of evidence not proper subjects for specific findings, and the referee's refusal was correct.

Judgment affirmed.

Opinion by *Mullin, P. J.; Smith, and Gilbert, J. J.*, concurring.

BAIL.

N. Y. SUPREME COURT, GENERAL TERM.

FIRST DEPARTMENT.

The People of the State of New York
ex. rel. Charles Devlin, v. the Court of Oyer and Terminer.

Decided March 6th, 1876.

The Court of Oyer and Terminer will not ordinarily consider on motion to have recognizance declared forfeited, facts which go to the question merely as to whether the recognizance could be enforced, or whether certain facts constitute a valid defence in favor of the bail.

These are questions of fact for trial before a proper tribunal.

Forfeiture of recognizance, &c.

Certiorari to the Court of Oyer and Terminer on review of proceedings upon forfeiting recognizance of William M. Tweed, principal, and Charles Devlin as surety.

The objection urged to the order declaring the recognizance forfeited, urged at the Oyer and Terminer, and upon the present appeal were:

1. That the recognizance purports to be given under indictments against the principal in the General Sessions, when, in fact, the indictment was in the Oyer and Terminer.

2. That the recognizance was not formally continued by order from one term of the Court of Oyer and Terminer to another.

3. That the principal was taken from

the custody of the bail by an order of arrest, at the suit of the people in a civil action under which he was imprisoned in default of bail until he escaped therefrom.

4. That there were six indictments for forgery in the Oyer and Terminer found on the same day, and if the recognizance in question was intended to refer to any of them, it does not distinguish which, and is therefore void for uncertainty.

Dudley Field for Relator.

B. K. Phelps, District Attorney.

Held, the condition of the recognizance is for the appearance of Tweed at the Court of General Sessions of the Peace, to answer said indictment against him at the present term, or at any subsequent term of said Court, or to any Court where such indictment might be sent for trial.

No point seems to have been made that the Court of Oyer and Terminer had not acquired jurisdiction of the indictment, if any such had been found in the Court of General Sessions, but it is alleged that none such had ever been found in that Court.

If this was a question upon which the recognizance did not operate as an estoppel against the defendant, it was one of fact to be tried and determined by some tribunal, and the same thing is true of each of the other objections.

With reference to the objection that it is left uncertain to which of the six indictments found in the Court of General Sessions the recognizance was intended to refer, and it was therefore void for uncertainty; the objection seems to us to be without substance, because the recognizance refers to but one, and the production of Tweed under the recognizance would discharge the suit completely, whatever number of indictments might be in existence.

The alleged uncertainty was entirely harmless, since the condition of the recognizance required the production of the principal to answer but one indictment,

and that being done, there would be no obligation to produce him upon another.

If the Court might in its discretion have considered the fact alleged in determining the question whether the order of forfeiture should be made yet, the relator had, we think, no such legal right, under the circumstances, to demand the exercise of that discretion, as would entitle him to review the proceedings on a writ of certiorari. His rights are, we think, fully preserved, and may be enforced by the proper application to the Court of Common Pleas.

The writs should be dismissed with costs.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

ATTACHMENT.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Wallace & Sons, a corporation, applts.
v. Castle et al, respts.

A place of business in N. Y. City does not constitute one a resident of this State, except for the purpose of an action in the N. Y. City District Courts.

Decided March 6, 1876.

Appeal from order of Special Term vacating attachment.

At the commencement of this action plaintiffs obtained an attachment on the ground of defendant's non-residence and thereunder levied upon certain of defendants' property.

On their application to vacate the attachment defendants, who are residents of Connecticut and New Jersey, showed that they had a place of business in the city of New York and claimed that they were residents within the meaning of the law as to attachments, and by three affidavits sought further to show that the amount sued for was not due when suit was brought as by special agreement the original time of payment, Aug. 1st, was extended to Aug.

20th, while suit was brought on the 10th. Plaintiffs denied any such agreement but alleged that a part payment had been made on the 9th; that one of the defendants advised the attachment and offered to point out their goods, which he afterwards did, and that two days after the attachment defendants made a general assignment for the benefit of creditors.

Two of the three witnesses for the defendants who swore to affidavits relative to the above agreement, upon a compulsory examination, admitted that the agreement was not within their personal knowledge but that their statements were founded on hearsay.

Attachment was at Special Term vacated.

A. R. Dyett, for applt.

Robert S. Hart, for respt.

On appeal.

Held, That the fact that defendants have a place of business in New York City does not make them residents of this State, except for purposes of an action in the District Courts in said city. As to the existence of a cause of action at the time when the attachment was issued, there seems to be some conflict in the affidavits. The point urged by defendants in their affidavits that there was a special agreement whereby their time was extended to the 20th of the month, does not seem to be sustained by their own witnesses, most of whom, on a compulsory examination, admitted that their information on this subject was by hearsay.

Defendant's affidavits failing for these reasons, there is no difficulty in saying that the weight of proof is strongly with plaintiffs. The payment by defendants of a part of this claim on the 9th, and the advice of one of them in recommending an attachment and offering to point out the goods, and his doing so when the sheriff came with the attachment, are circumstances strongly corroborating plaintiff's claim that the account was actually due.

Order vacating attachment set aside and motion to vacate denied.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

BEQUEST.

N. Y. COURT OF APPEALS.

Smith et al. applts. v. Van Nostrand respt.

Decided February 25, 1876.

A bequest of money to a legatee for her support during her natural life and with power to use so much of the principal as might be necessary for that purpose, with a remainder over to the testator's children, is valid.

It is competent for the testator to make the life legatee custodian of the money, in which case such legatee becomes the trustee for the children.

This action was brought to recover certain U. S. bonds in the hands of defendant. The complaint alleged that the will of G. I. S. contained this clause; "I give and bequeath unto my beloved wife Catharine, the sum of \$1,650, in lieu of dower in my real estate, for her support during her natural life, or as long as she remains my widow; then her said dower shall be transferred to my three children hereafter mentioned. \$50, of the above named sum shall be paid to her as soon as practicable after my decease, and the remainder, on or about six months after;" that the widow purchased U. S. bonds with this money, it having been paid over to her by the executors of G. I. S., and held them up to the time of her decease. That some time before or after her death, defendant became the custodian of the bonds, without value, and merely as the friend or agent of said widow; that plaintiffs notified him after her death that the bonds were their property under the will, and demanded them of defendant, but that he refused to give them up. No evidence was introduced except the will of G. I. S. The complaint was dismissed on the ground of no cause of action.

N. A. Halbert, for applts.

S. R. Ten Eyck, for respts.

Held, error, that the bequest was not absolute nor a valid life estate, but it was the intention of the testator to empower his widow to expend out of the principal of the fund bequeathed what should be necessary for her support, and the bequest of the remainder to his children was subject to the exercise of this power, and they would be entitled only to what remained over and above what she had used for the authorized purpose; that the gift of the remainder over to his children was not repugnant to the gift to the wife, and was valid. 1 P. Wms., 651; 5 Madd., 123; 47 N. Y., 512; 16 id., 83.

Patterson v. Ellis, 11 Wend., 259; *Hill v. Hill*, 4 Barb., 419; *Tyson v. Blake*, 22 N. Y., 558; and *Norris v. Beyea*, 3 Kern, 286, distinguished.

Also held, It is within the power of a testator, in bequeathing a life estate in a sum of money, with a remainder over, to confide the money to the legatee for life, in which case such legatee becomes the trustee of the principal. That plaintiffs being the *cestui que trust*, were the proper parties to claim the fund that the executors having paid it over to the widow as directed by the will, parted with all interest in it, and left it to follow the course directed by the will, and were discharged from all liability and divested of all power concerning it. 1 P. Wms., 651.

Judgment of General Term affirming judgment of nonsuit reversed, and new trial granted.

Opinion by *Rapallo, J.*

TOWN BONDS. ESTOPPEL. RE-CITALS.

U. S. SUPREME COURT.

The Town of Coloma, *Plaintiff in Error*, vs. David W. Eaves, *Def't in Error*.

Decided March, 1876.

Where legislative authority has been

given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal.

In error to the Circuit Court of the United States for the Northern District of Illinois.

It appears by the record that the plaintiff is a *bona fide* holder and owner of the coupons upon which the suit is founded, having obtained them before they were due and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of \$50,000.00 to the capital stock of the Chicago and Rock River Railroad Company, for which the town received in return certificates of five hundred shares of \$100.00 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds, and of the coupons attached to them, alleging that they were issued without lawful authority.

By an act of the legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls, on Rock River, to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted that "to aid in the construction of said road, any incorporated city, town, or township, organized under the township organization laws of the state, along or near the route of said road, might sub-

scribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the town, before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows:

"No such subscriptions shall be made until the question has been submitted to the legal voters of said city, town or township in which the subscription is proposed to be made. And the clerk of such city, town or township is hereby required, upon presentation of a petition signed by at least ten citizens, who are legal voters and tax-payers in such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township, which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town or township voting at such election have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor. He shall also execute to said company, in the name of such city, town or township, bonds bearing interest at ten per cent. per annum, which bonds shall run for a term of not more than twenty years; and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor, or other executive

officer, and be attested by the clerk of the city, town or township in whose name the bonds are issued."

Section 12 provides, "It shall be the duty of the clerk of any such city, town, or township in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

The bonds issued contained a recital of their use; that they were issued by authority of a certain act, and that the election had been held, and that the requisite number of voters had voted, etc.

Held, That it appearing by the recitals in the bond that the conditions upon which the bonds were to be issued had been fully complied with, the municipality could not go behind them to show irregularities in the election, or that no election was held, or whether there had been a compliance with this regulation, condition or qualification under which the bonds were authorized to be issued; that under the laws empowering the town to issue the bonds, the officers designated to sign and deliver them were made the judges of whether or not the necessary prerequisites to their issue had been complied with, and that a *bona fide* purchaser need not look beyond their decision as contained in the recitals.

Judgment affirmed.

Opinion by *Strong, J.*

RAISED CHECK. FORGERY.

SUPREME COURT OF LOUISIANA.

Decided February, 1876.

Louisiana National Bank v. Citizens Bank.

A bank having certified a raised check as good, is bound to pay it to an innocent holder.

From Superior District Court for the

parish of Orleans. This suit is brought by the Louisiana National Bank against the Citizens' Bank to recover the amount of a check drawn by the Bank of Mobile, purporting to be for twenty-seven hundred dollars, but which had been fraudulently raised from a smaller amount, and paid in ignorance of the forgery by the Louisiana National Bank, on which the check was drawn. The answer of the Citizens' Bank is the general issue; it avers the check was deposited in the Citizens' Bank by and for account of the New Orleans Savings Institution, which institution is called in warranty. The answer of the Savings Institution is the general issue, and the special defence that the Savings Institution took the check on deposit and paid out on account of it upon the faith of the certification that it was "good" put upon the check by the Louisiana National Bank. There is no dispute about the facts. The bill of exchange or check was drawn by the Bank of Mobile, but the amount thereof had been raised from \$27 to \$2,700 before it was presented to the Louisiana National Bank of New Orleans for certification; and the New Orleans Savings Institution, and the Citizens Bank received and paid their money for it, after the Louisiana National Bank had certified that it was "good."

Held, The certifying bank is bound to pay; the check having come to the hands of defendants after certification, it had a right to rely upon the genuineness of the check.

Judgment reversed and judgment ordered in favor of defendant with costs.

Opinion by *Ludeling, C. J.*

REPLEVIN. UNDERTAKING.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Harrison survivor *appl.* v. Utley and another *respts.*

Decided January, 1876.

The claim itself is consideration enough to support an undertaking upon a claim and delivery of personal property.

It is not necessary that the property should be taken and retaken in order to sustain an action on the bond, the taking and retaking may be claimed and bond given directly.

This was an action on an undertaking given in replevin.

In 1869, Jones and Harrison recovered a judgment against one E. Upon this an execution was issued, and certain iron pipe involved in the replevin action was sold. This pipe was claimed by the Water Works Co., of Rochester, and it was agreed between the engineer of the company and one S., the agent of J. & H., that it should remain where it then was and not be disturbed. After the sale of the pipe, the Water Co. went on and laid the same. It was then arranged between the Company and J. & H. that the Company should commence an action against J. & H., claiming a delivery of the pipe, and they did so, and the Company gave to J. & H. a bond and a summons and complaint, and the value of the property was fixed by stipulation, and it was also admitted that J. & H. had the property actually in their possession, &c., &c. In that action, J. & H. were successful, and then this action was brought on the undertaking, and defendants, who were sureties, set up as a defense that there was no consideration, and the bond was invalid as the property was never actually taken possession of by J. & H., and retaken by the Water Company.

The Court below dismissed the complaint.

H. R. Seiden for *respts.*

W. F. Cogswell for *applt.*

Held, No consideration is necessary to support an undertaking given upon a claim for the delivery of personal property pursuant to the Code, besides the claim itself. That is sufficient to uphold the

validity of the undertaking. (*Bildersee v. Aden*, 12 Abb., Pr. N. S. and cases cited.) Nor is it necessary that the undertaking should express a consideration. (*Cases Supra*, Laws 1863 Ch. 464.) In all cases the undertaking must accompany the claim, and it becomes an effectual instrument before there has been a delivery of the property. In this case the property in dispute consisted of iron water pipes, claimed to be the property of and in possession of the plaintiff, the Rochester Water Works Company. The plaintiff being about to take proceedings to recover the possession of the property, the Water Works Company treated it as in the actual possession of the plaintiff, and brought an action against him to recover the possession thereof. The undertaking in question was given in that action, and the possession of the property remained undisturbed. The formal proceedings prescribed by the Code, where a delivery is claimed in an action to recover the possession of personal property, were omitted. The object of such omission evidently was to obtain a determination of the ownership of the property without the expense and injury which would necessarily have attended an actual transfer of the possession thereof, first to one party and then to the other.

The court below held, that this omission destroyed the character of the instrument as a statutory undertaking, and that it was void for lack of any consideration to support it.

We are of opinion that the court erred. It was competent for the parties to the action to waive the useless formality of a double replevy. They did so, and the rights and interests of the sureties in the undertaking were in no degree affected thereby, except that their liability was diminished by the saving of the fees and expenses of the sheriff, which would have been incurred upon an actual replevy. The case does not show that any different result would have followed an actual re-

plevy, than that which was accomplished by omitting it. The undertaking on its face purports to have been given in an action brought by the Water Works Company against the plaintiff in this suit. It recites a claim for the delivery of the property to the Company, and the defendants undertake that the Company shall return the property to the plaintiff in this suit, in case a return shall be adjudged. We think these facts estop the defendants from denying that the property was claimed by the Company, or that it was taken out of the possession of the plaintiff in this suit and delivered to the Company. (Coleman v. Bean, 1 Abb., 394; 12 Abb. N. S. *Supra*.) Such facts also constitute an ample consideration for the undertaking, if one is necessary.

The case contains no finding respecting the discharge in bankruptcy of the defendant Utley. That subject, therefore, is not before us.

For the error stated, the judgment must be reversed, and a new trial granted with costs to abide the event.

Opinion by Gilbert, J.; Mullin, P. J., and Smith, J., concurring.

APPEAL. JURISDICTION.

U. S. SUPREME COURT.

David F. Barney, *applt.* v. The Steamboat D. R. Martin, her tackle, &c., The Oyster Bay and Huntington Steamboat Co.

Decided March, 1876.

The libellant claiming \$25,000, recovered a decree in the District Court for \$500, and the claimant having appealed to the Circuit, where the decree was reversed, no appeal lies to this Court.

Appeal from the Circuit Court of the United States for the Eastern District of New York. This suit was brought by Barney, the libellant, to recover damages for his wrongful eviction from the steam-

boat D. R. Martin. He demanded in his libel \$25,000 damages, but in the district court recovered only \$500. From this decree the claimant appealed. Barney did not appeal. The Circuit Court reversed the decree of the District Court and dismissed the libel. From this decree of the Circuit Court, Barney has appealed to this court. The claimant now moves to dismiss the appeal because "the matter in dispute" does not exceed \$2,000.

Held, This motion must be granted. Barney, having failed to appeal from the decree of the District Court, is concluded by the amount found there in his favor. He appears upon the record as satisfied with what was done by that court. In the Circuit Court, the matter in controversy was his right to recover the sum which had been awarded him as damages. If that court had decided against the claimant, he could not have asked an increase of his damages. The matter in dispute here is that which was in dispute in the Circuit Court, and as the matter in dispute here cannot exceed what was in dispute there, it follows that the amount in controversy between the parties in the present state of the proceedings is not sufficient to give us jurisdiction.

The appeal is dismissed.

Opinion by Waite, C. J.

PRINCIPAL AND SURETY.

N. Y. COURT OF APPEALS.

Clark, admr., &c. *respls.* v. Sickler, admr., &c., *applt.*

Decided February 22, 1876.

Mere indulgence to the principal will not work a discharge of the surety; to have such an effect the act must be legally injurious, or inconsistent with the legal rights of the surety.

This action was brought upon a promissory note made by one M. as the principal debtor and by the defendant's intestate as his surety. Defendants claimed that

their intestate had been discharged from liability as surety.

The referee before whom the case was tried found that M., the maker, after the note was due went to the holder with the money and offered to pay it, and the latter, by his wife, whom he had authorized to act for him, declined to receive it, giving as a reason that he had no use for the money, and requested M. to keep it, and that M. became insolvent.

R. M. Loomis, for resp't.

L. L. Bundy, for appl'ts.

Held, That the surety was not discharged by the act of plaintiff's intestate as there was no binding agreement to extend the time; that a mere indulgence will not work a discharge. An act to have an effect must be legally injurious or inconsistent with the legal rights of the surety, such as an agreement with the principal debtor extending the time of payment or in any manner changing the contract made by the surety. 45 Barb., 214; 3 N. Y., 446; 15 J. R., 433. A mere omission of duty on the part of the creditors will not release the surety unless the surety requests the performance thereof. If the surety had requested plaintiff's intestate to sue and he had refused to do so, the surety would have been discharged, if the negligence had produced the injury. 25 N. Y., 552; *Lewis v. Van Duser*, 25 Mich., 351, distinguished.

Judgment of General Term affirming judgment for plaintiff affirmed.

Opinion by *Church*, C. J.

BANKRUPTCY. COMPOSITION.

ENGLISH DECISIONS—COMMON PLEAS DIVISION.

Edwards, et al. v. Hancher.

Decided November 12, 1875.

When a composition in bankruptcy has been effected by giving the notes of a third party, and the notes are not met at maturity, the creditor

is remitted to his right to sue upon the original debt.

To a declaration for goods sold, etc., the defendant pleaded:

1. That he never was indebted as alleged.

2. That before action he satisfied and discharged the plaintiffs' claim by delivering to the plaintiffs three promissory notes whereby the defendant and Henry Smith jointly and severally promised to pay to the plaintiffs or their order three several sums of money, in full satisfaction and discharge of the plaintiffs' claim, which notes the plaintiffs accepted from the defendant in full satisfaction and discharge as aforesaid.

3. That after the accruing of the plaintiffs' claim, and before action, the defendant, being a debtor, unable to pay his debts, petitioned the Court of Bankruptcy for the liquidation of his affairs by arrangement or composition, and such proceedings were thereupon duly had, that the creditors of the defendant, by an extraordinary resolution, resolved that a composition of 3s. in the pound should be accepted in satisfaction of the debts due to the creditors from the defendant, and that such composition should be payable as follows: by three instalments of 1s. each, the first in three, the second in six, and the third in twelve months from the date of the confirmation of the said resolution, and that the security of Henry Smith should be accepted for the whole of the said composition and the receiver's and solicitors' costs, to be given in the joint and several promissory notes of the defendant and the said Henry Smith, and a statement showing the whole of the assets and debts of the defendant, and the names and addresses of the creditors to whom such debts were due, including the names and addresses of the plaintiffs and the amount of the debts due to them and claimed in and by the declaration, was produced at the meetings at

which the resolution passed. and the said resolution and statement were presented to the registrar and duly registered, and the said composition was duly paid and secured to the plaintiffs, pursuant to the said resolution, and all conditions had been fulfilled necessary to entitle the defendant to be discharged from the said debt by the resolution and the performance thereof. Issue thereon.

At the trial before Brett, J., at the sittings at Westminster, in Hilary Term last, the debt was admitted, and the defendant in support of his second and third pleas, put in the following resolutions (to which the plaintiffs were assenting parties), agreed to at a meeting of his creditors under the liquidation on the 14th of July, 1874:

1. That a composition of 3s. in the pound shall be accepted in satisfaction of the debts due to the creditors from the said John Hancher.

2. That such composition be payable as follows, by three instalment of 1s. each. The first instalment in three months, the second in six months, and the third in twelve months from the date of the confirmation of this resolution.

3. That the security of Henry Smith, of Muntz Street, Birmingham, glass cutter, be accepted for the whole of the composition and for the receiver's and solicitor's costs.

4. That L. J. Sharp, of Birmingham, be appointed trustee.

It was further proved that on the 24th of July, 1874, three joint and several promissory notes for £4 10s 10d each were made by the bankrupt and Smith, and delivered to the plaintiffs, who thereupon gave a receipt in the following form: "The Bankruptcy Act, 1869." In the County Court of Warwickshire, holden at Birmingham.

In the matter of John Hancher.

Received of Mr. Luke J. Sharp, trustee of this estate, three promissory notes dated

the 24th day of July, 1874, and payable at three, six, and twelve months respectively, amounting in the aggregate to the sum of £13 2s 6d, being a composition of 3s in the pound on our debt of £90 17s 11d, resolved to be accepted at a general meeting of creditors held on the 14th day of July, 1874, and in discharge of our debt. Edwards Brothers." These notes were made payable at the National Provincial Bank of England, at Birmingham, where the defendant kept no account. On the 29th of October, the first note became due, and was presented at the bank, but not paid. Without making any application to the surety, the plaintiffs on the 30th issued the writ in this action, claiming the original debt. On the part of the defendant it was contended that the acceptance by the plaintiffs of the promissory notes with a surety pursuant to the resolution, and giving the receipt, operated as satisfaction of the original debt, and that the plaintiffs were bound to call upon Smith, the surety, or might have compelled the trustee to enforce payment of the instalments. The learned judge directed a verdict to be entered for the plaintiffs, giving the defendant leave to move.

Held, The question is whether the plaintiffs are entitled to maintain their action, their right to which was suspended whilst the conditions bound them; that it was the payment of the composition, and not the mere resolution to accept a composition, which is the essence of this transaction; it was that which was intended to be accepted by the creditors in satisfaction and discharge of their claims, and the non-payment of the resolution, according to its terms, remitted the creditor to his rights upon the original debts. The fact that the notes were endorsed by a third party does not affect the question. Neither is the plaintiff bound to resort to the summary process of the

bankrupt court to enforce the composition.

Rule discharged.

Opinions by *Coleridge, C. J.* and *Grove* and *Archibald, J. J.*

PRACTICE.

NEW YORK COURT OF APPEALS.

The Standard Oil Company, *Applts*
v. The Triumph Insurance Company
Respt.

Decided February 1, 1876.

This Court will not reverse a judgment upon a fact which the judge below expressly refused to find, and which was not conclusively proved. Proof of a custom is competent to explain the conduct of parties to a contract.

This action was brought to have the cancellation of a policy of fire insurance set aside and to enforce the policy. It appeared that the policy was procured by a broker employed by the plaintiff. By one of its provisions it was optional with the company to cancel the policy. Upon notice of the issue of the policy it directed its agent to raise the rate of premium one per cent. or to cancel the policy. Subsequently the broker returned the policy to defendant with instructions to cancel it, and defendant did so. The case was tried before a judge without a jury, who found as a conclusion of law, that the return for cancellation, although by mistake and permitting the policy to remain as cancelled in the possession of defendant's agent until after the fire, was enough to defeat the action. There was no finding of fact as to the mistake. A judgment was directed dismissing the complaint. Upon a settlement of the case the judge was requested, but refused, to find that the policy in suit was returned for cancellation by mistake.

Samuel Hand, for applt.

James Emott, for respt.

Held, That this Court would not be

justified in reversing a judgment upon a fact which a judge or referee had expressly refused to find, and which was not conclusively proved; that the remedy of the party was by motion to compel a finding, and a denial of such a motion would be reviewable in this Court.

Also held, That defendant was justified in regarding the broker as plaintiff's agent, and as clothed with full authority to act for plaintiff in procuring, modifying or cancelling the policy, and his acts in respect to the policy are the same as if done by plaintiff. 106 E. C. L. 381; 13 Wend., 518; 21 id. 279; 35 Barb., 463; Story on Ag., §§ 134-5, 451-2

Upon the trial evidence was given by defendant of a custom among those engaged in the insurance as to the endorsement of any changed or increased rate before the risk is considered taken.

Held, That this evidence was competent to explain the conduct of the parties, and how they regarded a verbal arrangement for an increase of premium, and the acts necessary to be done to consummate it.

Also held, That it was proper to receive in evidence entries made upon the broker's book, as bearing upon the fact of a mistake, and upon his credibility and that of his clerks.

Judgment of General Term affirming judgment dismissing complaint, affirmed.

Opinion by *Church, C. J.*

BILL OF LADING. COMMON CARRIER.

SUPREME COURT OF PENNSYLVANIA.

Elkins v. The Empire Transportation Company.

Decided March 6, 1876.

A shipper or his assignee is bound by the value of the goods written in the bill of lading.

Where the written and printed parts of a contract are at variance the written must govern.

Error to District Court of Philadelphia County.

This was an action on the case by Elkins against the Empire Transportation Company for the negligent loss of certain goods.

One Nusbaum delivered to the defendants at Peoria, Illinois, fifty barrels of high wines, there worth \$2,783.70, to be carried to Philadelphia, receiving a bill of lading for these barrels containing the following clause:

"The rate of freight through is 50 cents per 100 lbs....Received of *A. Nusbaum* 50 Bbls. *H. Wines*...valuation \$20 per bbl....And it is further agreed that the amount of the loss or damage so accruing so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading."

The words italicized were *written*, the rest printed.

This bill of lading was transferred to the plaintiff Elkins as collateral security for a draft of the shippers for \$2,783.80, which was then accepted and paid by the plaintiff. The goods were nearly all destroyed by an accident while in transit. It appeared from a printed freight notice, offered in evidence by the defendants, that they carry four classes of freight, for the first class charging \$1.60 per 100 pounds, for the second \$1.20, for the third 80 cents, for the fourth 50 cents, fourth class freight to be taken at an agreed valuation not exceeding \$20 per bbl. Defendants then showed that the valuation of \$20 per bbl. was inserted in the bill of lading in accordance with an understanding between the defendant and the shipper, that in case of loss the defendant should not be liable beyond that amount. This evidence the plaintiff objected to. The plaintiff requested the court (Thayer, P. J.) to instruct the jury "That under the legal construction of the contract expressed in

the bill of lading the liability of the defendants for the plaintiff's loss is not limited to \$20 per bbl." This the court declined, saying, "If there was a contract either express or implied that the defendants were not to be liable beyond \$20 per bbl., they are not liable beyond that. It is not necessary for you to find that the shippers should have said 'we won't hold you for any more than \$20 per bbl.' not necessary to use such words. The contract may be implied from all the circumstances and the acts of the parties, and various items of evidence, as from express words of the party himself, and if you find such a contract from all the facts and circumstances of the case, you should limit the liability to \$20 per bbl. Such an agreement to limit responsibility according to value from the facts in evidence, if fairly deducible from them, may be, though the shipper did not in express words tell the carrier he would not be responsible. It may be implied from circumstances, a course of business and regulations known to the shippers, and from acceptance of a bill of lading based on such a course of business it may be fairly inferred. You should have no difficulty in this case. It is of no consequence what the plaintiffs understood as to the limitation of the defendant's responsibility; the question is what the shippers understood, and if that limitation was the object of the company in writing 'valuation \$20 per bbl.' on the bill of lading, and the shipper so understood it, the company are not liable beyond that limitation."

Verdict for the plaintiff for \$955, being the value of the goods destroyed at the rate of \$20 per barrel. To this judgment the plaintiff took a writ of error, assigning the admission of the evidence objected to, and the answers and charge of the court.

Held, The valuation of \$20 per barrel written into the blank of the printed bill of lading, together with the stipulated freight at 50 cents per 100 lbs., are con-

trolling parts of the bill of lading, and not controlled by the printed stipulation that the amount of the loss or damage occurring and falling on the carriers, shall be computed at the value or cost of the goods at the place and time of shipment. These facts, written into the printed bill, express the true contract of the parties, and the \$20 per bbl. must, therefore, be regarded as the value or cost fixed by the parties in advance, as that is to be treated as such, as of the time and place of shipment. This accords with the evidence that such freight, if left to be determined in value at the time and place of shipment, would not be carried at less than \$1.60 per 100 lbs. There was an ample consideration, therefore, for the low valuation in the diminution of the freight as stipulated, at 50 cents.

Judgment affirmed.

Per curiam opinion.

CONSTITUTIONAL LAW.

U. S. SUPREME COURT.

Chy Lung, Plaintiff in Error, v. J. H. Freeman, R. K. Piotrowski, Commissioner of Emigration, and William McKibben, Sheriff of the City and County of San Francisco, California.

Decided March, 1876.

A statute of a State which operates directly upon an immigrant by requiring the master, owner or consignee of a vessel bringing foreigners into such State, to give an onerous bond for the future protection of the State against the support of the passenger is in conflict with the Constitution of the United States, and therefore null and void.

In error to the Supreme Court of the State of California.

The plaintiff in error was a passenger on a vessel from China, being a subject of the Emperor of China, and is held a prisoner because the owner or master of the vessel who brought her over refused to

give a bond in the sum of five hundred dollars in gold, conditioned to indemnify all the counties, towns and cities of California against liability for her support or maintenance for two years.

The statute of California, unlike those of New York and Louisiana, does not require a bond for *all* passengers landing from a foreign country, but only for classes of passengers specifically described, among which are "lewd and debauched women," to which class it is alleged plaintiff belongs.

The plaintiff, with some twenty other women, on the arrival of the steamer Japan from China, was singled out by the Commissioner of Emigration, an officer of the State of California, as belonging to that class, and the master of the vessel required to give the bond prescribed by law before he permitted them to land. This he refused to do, and detained them on board. They sued out a writ of *habeas corpus*, which by regular proceedings resulted in their committal, by order of the Supreme Court of the State, to the custody of the sheriff of the county and city of San Francisco, to await the return of the Japan, which had left the port pending the progress of the case; the order being to remand them to that vessel on her return, to be removed from the State.

All of plaintiff's companions were released from the custody of the sheriff on a writ of *habeas corpus*, issued by Mr. Justice Field, of this Court. But plaintiff, by a writ of error brings the judgment of the Supreme Court of California to this Court, for the purpose of testing the constitutionality of the act under which she is held a prisoner.

The statute provides that the Commissioner of Immigration is "to satisfy himself whether or not any passenger who shall arrive in the State by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic,

idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease, existing either at the time of sailing from the port of departure or at the time of his arrival in the State, a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman;" and no such person shall be permitted to land from the vessel, unless the master or owner or consignee shall give a separate bond in each case, conditioned to save harmless every county, city and town of the State against any expense incurred for the relief, support or care of such person, for two years thereafter.

The commissioner is authorized to charge the sum of seventy-five cents for every examination of a passenger made by him, which sum he may collect of the master, owner, or consignor of the vessel by attachment. The bonds are to be prepared by the commissioner, and two sureties are required to each bond, and for preparing the bond the commissioner is allowed to charge and collect a fee of three dollars, and for each oath administered to a surety concerning his sufficiency as such, he may charge one dollar. It is expressly provided that there shall be a separate bond for each passenger, that there shall be two sureties on each bond, and that the same sureties must not be on more than one bond, and they must in all cases be residents of the State.

If the ship master or owner prefers, he may commute for these bonds by paying such a sum of money as the commissioner may, in each case, think proper to exact and after retaining twenty per cent. of the commutation money for his services, the commissioner is required once a month to deposit the balance with the Treasurer of the State.—(See chapter I., Article VII., of the Political Code of California, as modi-

fied by section 70, of the amendments of 1873-4.)

Held, The powers which the commissioner is authorized to exercise under this statute are such as to bring the United States into conflict with foreign nations, and which can only belong to the federal government.

If the right of the States to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner landing within their borders exists at all, it is limited to such laws as are absolutely necessary for that purpose, and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States.

The statute of California in this respect extends far beyond the necessity in which the right is founded, if it exists at all, and invades the right of Congress to regulate commerce with foreign nations, and is, therefore, void.

WARRANTY. DAMAGES.

ENGLISH DECISIONS—COMMON PLEAS DIVISION.

Smith v. Green.

Decided November 5, 1875.

The defendant having sold a cow to plaintiff, a farmer, with a warranty that she was free from foot and mouth disease, and the plaintiff having placed the cow with other cows, whereby the latter became infected with the disease and died, the defendant is liable for the entire loss.

The first count of the declaration was for the breach of an alleged warranty that a cow sold by the defendant to the plaintiff was free from foot and mouth disease. The second alleged that the defendant falsely and fraudulently represented the animal to be free from foot and mouth disease, and the damage alleged was that

the plaintiff, who was a farmer allowed the cow to herd with other cows, some of which took the disease, and (with the cow in question) died.

The case was tried before Archibald, J. at the assizes at Manchester. Upon a conflict of evidence, the jury found that the defendant had warranted the cow at the time of the sale to be free from foot and mouth disease, but they negatived the alleged false representation. It was found that the animal was at the time suffering under the disease in question, and communicated it to other cows belonging to the plaintiff, with which she had, in the ordinary course of the plaintiff's business as a farmer been placed, and that she and several of them in consequence died. On behalf of the defendant, it was contended that, upon a mere breach of warranty, he was not responsible for the loss of the other cows, though he would have been so if he had been guilty of a false representation. The learned judge, however, in his summing up, told the jury that, in estimating the damages, the plaintiff was entitled to recover in respect of the breach of warranty. They might take into their consideration the fact that the buyer was a farmer, and that the seller knew, or must be taken to have known, that the cow in question would be placed with other cows, and that the consequences which had resulted might naturally be expected to happen. The jury returned a verdict for the plaintiff, with £50 damages, and leave was reserved to the defendant to move to reduce the damages to £8 if the court should be of opinion that they ought to be confined to the value of the cow sold.

Held, That it was no misdirection to tell the jury that in estimating the damages to which the plaintiff was entitled for the breach of warranty, they might take into their consideration the fact that the buyer was a farmer, and that the seller knew, or must be taken to have

known, that the diseased cow would be placed with other cows; and that if they found that the defendant knew that in the ordinary course of his business, the plaintiff would so place her, then the loss of the other cows might fairly be considered to be the natural and necessary consequence of the defendant's breach of warranty, and that they might assess the damages accordingly.

Rule refused.

Opinions by *Coleridge, C. J., Brett and Grove, J. J.*

LIABILITY. EVIDENCE.

N. Y. SUPREME COURT, GENERAL TERM—
FIRST DEPARTMENT.

John H. Rostern, *respt.*, against Amizi Dodd, *applt.*

Decided March 6th, 1876.

There is no implied liability on the part of an employer to care for an employee injured in his service. Judgment reversed on account of admitting, under objection, parol evidence of a writing without satisfactorily accounting for its non-production.

Appeal from judgment entered on report of a referee in favor of plaintiff.

The complaint alleges that one Culver, while in the employ of defendant, received injuries, and that defendant promised to pay plaintiff for board and services Culver rendered while he was suffering from the injuries so received. Defendant was shown to be general manager of Dodd's Express Company, in whose employ Culver was injured. There was a conflict of evidence as to the promise, defendant denying it. Plaintiff proved the presentation of a bill to defendant; plaintiff's witness swore that the amount of the bill was \$174. Defendant swore that the bill was for a less amount, and made out to "Dodd's Express," and that he thought that the witness, who presented the bill, took it away with him on his refusal to pay it.

Plaintiff's counsel asked the following question :

"Did that bill for \$174 embrace the usual current charges for such services and attendance by landlords of public houses?"

This was answered under objection and exception.

Held, That had Culver been in the employ of the defendant, there is no implied liability of an employer for care or services rendered an employee injured in his service. That the only ground on which defendant could be held liable is that of an express promise, and it is doubtful whether the evidence would sustain a finding of such promise; but without passing on this, the judgment should be reversed for error in admitting proof of the contents of the bill claimed to have been presented, without producing it or satisfactorily accounting for its non-production.

Judgment reversed. New trial granted, costs to abide the event.

Opinion by *Davis, P. J.*; *Brady and Daniels, J.J.*, concurring.

LIFE INSURANCE.

N. Y. SUPREME COURT—GENERAL TERM.

FIRST DEPARTMENT.

Olive A. Dilleber v. the Home Life Insurance Company.

Decided March 6, 1876.

Testimony of physicians as to knowledge of diseases obtained in their professional capacity, and necessary to enable them to prescribe, is inadmissible.

Letters written by the assured are admissible to show false statements, or concealment of facts affecting his insurability, which he was bound to disclose.

Motion for a new trial on verdict directed for defendants. Exceptions to be heard in the first instance at General Term.

Action on a policy of life insurance on life of plaintiff's husband in favor of plaintiff. Defence, fraudulent acts in obtaining the policy; suppression of material facts. Some of these facts were proved by physicians who attended him professionally and obtained their knowledge in that way. This evidence was received under objection. One question in the application was whether during the last ten years he had had any sickness or disease. He replied, "Nine years ago, an attack of typhoid fever." In reply to the question, "Have you employed or consulted any physician, &c. ? if so, give names," he gave the name of only one. It was shown by his own admissions that he had, during the time designated, had other serious sickness, and been under the care of other physicians.

Held, That it was error to admit the testimony of physicians as to knowledge of diseases obtained in their professional capacity, and necessary to enable them to prescribe.

Held also, That the admissions of the assured viz: letters written by him were admissible to show the false statements. Excluding the testimony of the physicians, it appears that he had a sickness that was important as affecting his insurability, which he was bound to disclose. That the warranty is false, and the defendant absolved.

Judgment affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

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PRINCIPAL AND AGENT.

U. S. SUPREME COURT.

Hoover, Assignee of Oppenheimer pl'tf
in error, v. Wise *et al.*, def't in error.

Where an attorney is employed by a collection agency to collect a claim, the attorney is the agent of the collection agency, and not of the creditor.

Error to the Supreme Court of New York.

This action is brought by an assignee in bankruptcy to recover back a sum of money collected from the bankrupt after the occurrence of several acts of bankruptcy.

Under the practice of the State of New York the case was referred to a referee, upon whose report judgment was entered at the special term in favor of the plaintiff. From this judgment an appeal was taken by the defendants to the general term. Upon the hearing at the general term this judgment was reversed and a new trial was ordered.

The plaintiff appealed to the Court of Appeals.

The Court of Appeals affirmed the judgment of the general term and remitted the record to the Supreme Court, that the judgment might be there entered and enforced. From this judgment, entered upon that *remittitur*, the present writ of error is brought.

It appears that an account or money demand was delivered by its owners to Archer & Co., a collecting agency in the city of New York, and received by them, with instructions to collect the debt, and with no other instructions; that this agency transmitted the claim to McLennan & Archbold, a firm of practicing lawyers in Nebraska City.

Several acts of bankruptcy had been committed by Oppenheimer when Mr. McLennan persuaded him to confess judgment for the debt thus sent to him. Proceedings in bankruptcy were instituted against Oppenheimer within four months after such confession, and were prosecuted to a decree of bankruptcy. At the time of receiving the confession, McLennan was well aware of the insolvency of Oppenheimer, and that the confession was taken in violation of the provisions of the bankrupt act.

The money collected was remitted to the collection agents in New York, from whom he received the claim, but never paid by them to Wise & Greenbaum, the creditors. When the debt in question was delivered to the collection agency in New York, it was so delivered, as testified by one of its owners, "for collection." "Archer & Co.," he says, "were collection agents in New York. I gave them no directions except to try their best to collect it. They told me they would send it out (to Nebraska). I gave no other instructions." "The business of Ledyard, Archer & Co. (he says) was to take claims for collection in different parts of the country, and, if necessary, have them sued."

Mr. Archer, of the collection firm, testifies that he received the claim for collection; that he told the defendants if sent on at once he thought it could be collected; that the account was verified by one of the defendants and sent by the witness to Mr. McLennan, a lawyer, at Nebraska City; that he afterward told the defendants the account had been put in judgment, and that he hoped to collect the money, or the greater part of it. When he made this communication he had McLennan's letter in his hand, and communicated it to

the defendants. He further testified that the money had been received by him from McLennan, but had never been paid over to Wise & Co.

The referee held that the knowledge of the condition of the bankrupt by the attorneys residing in Nebraska, who took the confession of judgment, was the knowledge of the creditors in New York. The Supreme Court and the Court of Appeals adjudged otherwise, holding them to be the agents of Archer & Co., and not of Wise & Greenbaum, the creditors. It is upon this point of difference that the case is now presented for decision.

Held, The general doctrine that the knowledge of an agent is the knowledge of the principal, cannot be doubted.

It must, however, be knowledge acquired in the transaction of the business of his principal, or knowledge acquired in a prior transaction then present to his mind, and which could properly be communicated to his principal.

Neither can it be doubted that where an agent has power to employ a sub-agent, the acts of the sub-agent, or notice given to him in the transaction of the business, have the same effect as if done or received by the principal.

But for the acts of the agent of an intermediate independent employer, a principal is not liable; that in this case McLennan was not the agent of Wise & Greenbaum in such a sense that his knowledge of the condition of Oppenheimer is chargeable to them; he was the agent of the collecting agent and not of the defendants.

Judgment affirmed.

Opinion by *Hunt, J.*; *Miller, Clifford* and *Bradley, J. J.*, dissenting.

PRACTICE. EVIDENCE.

N. Y. SUPREME COURT, GENERAL TERM.

FOURTH DEPARTMENT.

Conway, *applt.*, v. Moulton, *respt.*

Decided January 1, 1876.

Under § 399 of the code the owner of chattels is not permitted to prove by his vendor that a demand for the possession of such chattels was made by such vendor as the agent of the owner of the deceased partner of one in possession of such chattels.

This is an appeal from a judgment ordered upon the decision of the Monroe Circuit dismissing the complaint with costs.

James Conway sold the tools in controversy to the plaintiff who is his daughter. Afterwards he engaged in the service of the defendant and with the consent of his daughter, himself made an agreement with them whereby the use of the tools in the prosecution of the same work in which the father was employed, was transferred to them for an indefinite period, for what the said use should be worth.

When this work ceased the tools were left in the possession of the defendant, and this action is brought to recover the value thereof, upon the allegation that they had been demanded from the defendant Russell, who died before the trial, and that Russell refused to deliver them. Upon the trial the plaintiff offered to prove by James Conway the demand and refusal. The court refused to allow the witness to testify to these facts and the plaintiff excepted.

The court in affirming the judgment of the court below based its opinion upon § 399 of the code of procedure.

J. C. Cochran for *applt.*

Boss & Bissell for *respt.*

Held, That this case comes not only within the intent but the words of section 399.

Opinion by *Gilbert, J.*; *Mullin, P. J.* and *Smith J.*, concurring.

HUSBAND AND WIFE.

N. Y. SUPREME COURT—GEN'L TERM.

FOURTH DEPT.

Potter, *respt.* v. Virgil, *applt.*

Decided January, 1876.

Where a physician is employed in attendance upon a sick person his employment continues while the sickness lasts, and the relation of physician and patient continues unless it is put an end to by the assent of the parties, or the express dismissal of the physician,

A wife cannot abandon her husband's house and home and bind him for necessities, provisions, clothing, medical attendance, &c., except on proof of gross abuse, neglect and misconduct on the part of the husband.

This is an action for services. The plaintiff is a physician and was employed by defendant to attend upon his wife who was sick at defendant's house, and so attended her up to about August 10, 1873, and plaintiff's services up to this date were duly paid for by defendant.

On or about August 10, 1873, the father of defendant's wife, without the knowledge or consent of the defendant, removed her to his (said father's) house some six miles from plaintiff's and defendant's residence, and the services for which this action is brought were rendered subsequent to the removal of defendant's wife to her father's, and continued up to her death, about September 19, 1873.

Defendant insists he was not liable for such services after the removal from his house. On the question whether defendant ever dismissed plaintiff or forbid his further attendance upon his wife the evidence was as follows :

Plaintiff testifies that after her removal defendant called upon him to learn what he, plaintiff, knew about his wife's condition and plaintiff told him,

and on this occasion defendant asked plaintiff if he had been to see her, and plaintiff told him he had, and also how he found her. Defendant also asked if he was going down to see her again and plaintiff said he should on the next day.

Defendant states the same interview as follows :

"I called at the doctor's house and had considerable conversation with him about the occurrence, and told him they had taken her off unbeknown to me, and asked him if he had been down to see her, and he said he had, and I asked him how he found her and he said comfortable ; and I asked him when he was going down again, and he said he did not know, in two or three days. Defendant also testified that he had sent plaintiff to his wife's father some days after this, and that his father-in-law had refused to let him see his wife. On this occasion he asked plaintiff how his wife was—he said about the same as she was at your house.

Geo. U. Kennedy for *applt.*

W. C. Ruger for *respt.*

Held, That the evidence justified the assumption that after the removal of the wife plaintiff visited her with the knowledge and assent of defendant, or at least his attendance was not forbidden nor was the contract of employment ever revoked.

That had defendant in any of the interviews with plaintiff expressly forbidden his attendance on his wife after her removal, a different question might have arisen, and there being a conflict of evidence on this branch, the judge would have been obliged to submit the question to the jury, but under the evidence in the case the refusal of the judge to submit the question of employment to

a jury on the ground "that where a physician is employed to attend upon a sick person his employment continues while the sickness lasts, and the relation of physician and patient continues unless it is put an end to by the assent of the parties or the express dismissal of the physician," was correct.

That had the wife abandoned her husband's home except upon clear proof of gross neglect, abuse or misconduct on the part of the husband, the husband would not have been liable for necessities, medical attendance, &c., but under the circumstances, in this case having hired plaintiff, and even after his wife's removal impliedly assenting to the rendering of the services, and not forbidding them, defendant is clearly liable.

Judgment affirmed.

Opinion by *Mullin, P. J.; Gilbert and Smith, J. J.*, concurring.

STATUTE OF LIMITATIONS. WHEN RIGHT OF ACTION ACCRUES.

U. S. SUPREME COURT.

Terry, plaintiff in error v. Tubman, defendant in error.

Decided March, 1876,

Under a bank charter which bound the individual property of the stockholders for the ultimate redemption of the bills issued, a right of action accrues to each bill-holder when the bank refuses to redeem, and is notoriously and continuously insolvent; it is not necessary to first exhaust the assets of the bank by legal proceeding.

In error to the Circuit Court of the United States for the Southern District of Georgia.

The plaintiff, a citizen of Georgia, brings his action to recover from Mrs. Tubman, the sum of \$5,400. He al-

leges that he holds the circulating notes of the Bank of Augusta, Georgia, to that amount, and that the defendant was, in June, 1862, and thenceforth, a holder of three hundred and seven shares of the stock of that bank, of the nominal value of one hundred dollars per share.

The Bank of Augusta was chartered December 27, 1845, and its charter contained the following provision:

"Sec. 3. That the individual property of the stockholders in said bank shall be bound for the ultimate redemption of the bills issued by said bank in proportion to the number of shares held by them respectively; and in case of a failure of said bank, all transfers of stock made within six months prior to said failure or refusal on the part of said bank to redeem its liabilities in specie when required, shall be void, and the private property of the individuals transferring said stock shall be liable for the redemption of the bills of said bank as above stated."

The defendant pleaded the statute of limitations, alleging that all of the bank notes sued on were issued by the Augusta bank prior to June 1, 1865, and that before that date the bank had become insolvent, unable to meet its liabilities, had voluntarily stopped payment and ceased to do business, and so continued down to the time of the plea. To this plea the plaintiff demurred. The circuit court rendered judgment for the defendant on this plea, from which the plaintiff brings his writ of error to this court.

The statute of limitations of the State of Georgia was passed on the 16th March, 1869, and is as follows, so far as this action is concerned, viz:

"Sec. 3. And be it further enacted, That all actions on bonds or other instruments under seal, and all suits for

the enforcement of rights accruing to individuals or corporations, under the statutes or acts of incorporation, or in any way by operation of law, which accrued prior to 1st June, 1865, not now barred, shall be brought by 1st January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred.

Sec. 6. That all other actions on contracts, express or implied, or upon any debt or liability whatsoever due the public, or a corporation, or a private individual or individuals, which accrued prior to 1st June, 1865, and are not now barred, shall be brought by 1st January 1870, or both the right and the right of action to enforce it shall be forever barred. All limitations hereinbefore expressed shall apply as well to courts of equity as courts of law, and the limitation shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to the 1st June, 1865, or was then only inchoate and imperfect, if the contract or liability was then in existence."

The plea demurred to alleges, and it is to be here assumed to be true, that the bank notes held by the plaintiff had been issued by the bank prior to June 1, 1865, the time specified in the limitation act just quoted. It is further alleged, to be taken as true, that prior to that time the bank had become notoriously insolvent, unable to meet its liabilities, and had ceased to do business.

The question is whether the right of action now sought to be enforced, had, on or before June 1, 1865, by means of these facts, accrued to the plaintiff. If it had, the present action is barred by the statute, as this is one of the actions embraced within the terms of the statute.

The plaintiff insists that no cause of action against the stockholder existed on the first of June, 1865, and not until the bank had made its assignment in 1866, its affairs had been administered and a demand of payment of the bills had been made upon the bank and had been refused.

Held, That the facts alleged in the plea are sufficient to make it a good plea; in other words, that the cause of action, so far as there is a separate and distinct right of action in favor of each bill-holder, was in force on the first of June, 1865.

2. That it is not necessary first to exhaust the assets of the bank by legal proceeding. The case is not so much like that of the guaranty of the collection of a debt, where the previous proceeding against the principal debtor is implied, as it is like a guaranty of payment, where resort may be had at once to the guarantor without a previous proceeding against the principal.

That the liability for the ultimate redemption of the bills, if properly enforced, arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent.

Judgment affirmed.

Opinion by *Hunt, J.*

SPECIFIC PERFORMANCE. POSSESSION.

N. Y. COURT OF APPEALS.

Miller, respt., v. Ball, applt.

Decided Feb. 25, 1876.

Where, under a parol contract for the purchase of land, the vendee has paid the consideration but received no deed, consent that the vendee may take possession of the land will be implied; it cannot be inferred that the vendor intends to retain the consideration and the use of the land.

This action was brought to compel the specific performance of a contract for the purchase of lands, entered into by the agent of the parties. It was agreed, in January, 1864, by parol, that plaintiff should pay \$150 for the land, and receive a warranty deed. In April following defendant and his wife executed a deed, which was delivered to plaintiff's agent, who then paid the whole consideration, \$150. This deed was subsequently delivered to plaintiff, who found that it did not truly express the consideration—it being therein stated at \$100—and it contained certain reservations not authorized by the agreement; he thereupon declined to receive it, and returned it to defendant's agent, who agreed to have it corrected and returned to him. This was never done. Defendant did not repudiate the parol agreement, but agreed to "make it all right." He did not decline to perform it until April, 1867—a short time before this action was commenced. The land was wild and uncultivated, several miles from any highway. In the Fall of 1864 plaintiff, with the consent of the adjoining owners, cut out and made a road for two and a half miles from the highway to the lot, and, prior to the commencement of this action, made roads upon the lot, underbrushed and cut up fallen trees thereon, preparatory to clearing about a quarter of an acre, built a bough shanty, annually cut and drew from the lot wood and timber, and paid the taxes thereon. The referee found that there had been a sufficient part performance of the agreement to take it out of the operation of the statute of frauds.

L. W. Russell for resp't.

Samuel Hand for appl't.

Held, no error: That after plaintiff had paid the full consideration, in re-

liance upon the promise of defendant to give him the title to the land, there was an implied consent on the part of the defendant that he might take possession as owner. In all cases where the contract for the sale of land is silent as to the possession, and the vendee has paid the entire consideration, and fully performed on his part, and all that remains for the vendor is to give the deed, there must be an implied agreement or license that the vendee may at once take possession and have the use of the land. In the absence of proof to the contrary, it could not be inferred that the vendor intended to retain the use of both the land and the consideration paid therefor. *Suffern v. Townsend*, 9 J. R., 35; *Erwin v. Olmstead*, 7 Cow., 229; *Kellogg v. Kellogg*, 6 Barb., 116; *Spencer v. Tobey*, 22 Barb., 260, distinguished.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Earl, J.*

PRACTICE. EXECUTION. PROCEEDINGS TO REVIVE.

N. Y. COURT OF APPEALS.

Wallace, appl't., v. Swinton, resp't.

Decided February 15, 1876.

An execution against the estate of a deceased debtor is irregular and void unless the proper proceedings as authorized by section 376 of the code have been had, and a sale thereunder passes no title.

Chapter 295 of the laws of 1850, and section 376 of the code not being entirely repugnant, may both stand.

This was an action of ejectment. Plaintiff claimed title by virtue of a sale under two executions issued upon judgments recovered against F. in his lifetime. F. died in 1864. In June, 1868, plaintiff applied to the surrogate

of Orange county for permission to issue executions on the judgments. It did not appear that any of the interested parties were notified of the application to the surrogate. After the surrogate had granted leave to issue executions, application was made to the supreme court and the order to show cause why executions should not issue was served on one of the children of F. in New Jersey, where all the children and heirs at-law of F. then resided, they all being minors, no guardian *ad litem* was appointed for them. The executions were issued in pursuance of leave thus obtained, and the land, with other lands, was sold thereunder. Plaintiff was never in possession of the land. Prior to the giving of the sheriff's deed to the plaintiff, defendant took possession under one whom he supposed had title or the means of obtaining title.

S. W. Fullerton for applt.

C. H. Winfield for resp.

Held, That the executions were void so far as the real estate sought to be reached was concerned, and the plaintiff acquired no title under the sale as against those not made parties, to the proceedings authorized by law for the revival of the judgment against their property, and making them parties to the judgment. 1 Cow., 711; 10 Wend., 206; 18 N. Y., 412.

It is not optional with the judgment creditor whether he proceeds under § 284 or 376 of the code. If the debtor is alive he must proceed under the former, if dead under the latter.

It was claimed that chap. 295 of the laws of 1850, which relates to the issuing of executions, and the enforcement of judgments against deceased judgment debtors, enacts, among other things, that the leave of the surrogate is necessary, superseded the provisions

of the code regulating the procedure in the court in which a judgment is recovered for enforcing the same after the death of the debtor.

Held, That as the two statutes are not entirely repugnant both may stand. 11 How., 200; 13 Abb. Pr., 80; 45 N. Y., 368; 12 Wend., 542; Flanigan v. Iman, 53 Barb., 587; Wilgus v. Bloodgood, 33 How., 289, questioned.

Order of general term granting a new trial affirmed.

Opinion by Allen, J.

STATE CONTRACTS. CONSTITUTIONAL LAW. DAMAGES.

N. Y. COURT OF APPEALS.

Lord, et al., *appls.*, v. Thomas, *resp.*

Decided Feb. 1, 1876.

The State cannot be compelled to proceed with the erection of a public building by a contractor with whom it has a contract for its erection. A law of the state suspending such a work is not unconstitutional, as impairing the obligations of the contract. The contractor's remedy for any damages he might sustain is an application to the legislature.

This was an action brought by plaintiffs, as assignees of one A., of a contract between him and certain persons styled commissioners, for doing certain "brick and stone work for the Elmira Reformatory," to restrain defendants from letting any portion of the work contracted for to other persons. The said commissioners were appointed under chapter 427, Laws of 1870, and were charged with the general superintendence of the ground for the reformatory, which they were authorized to purchase, and the design and construction of the building, subject to the approval, by the governor, comptroller and State engineer, of the plan adopted by them. A site was purchased and a

plan of the building adopted and approved, and a contract entered into with A. to furnish the materials and do the stone and brick work required in its erection. The contract was assigned to plaintiffs, with the assent of the commissioners. In 1874, after a part of the work had been done under the contract, an act was passed by the legislature (chapter 323) which suspended the commissions and provided for the appointment, by the governor, of a superintending builder in their place, and vested in him, so far as the construction of the building was concerned, all the powers and duties theretofore possessed by the commissioners, and provided for the purchasing of the material, and that all things connected with the erection of said building should be done by contract, to be awarded to the lowest responsible bidder, after being advertised as is now required for the letting and advertising of state work on the canals. Defendant was appointed superintending builder. He advertised for proposals to do certain work which was included in the contract with A., and plaintiffs claimed that they were entitled to perform it.

Wm. H. Bowman for appls.

Geo. F. Danforth for respt.

Held, That defendant was authorized by the Act of 1874 to enter into a new contract for the completion of the building, and could not be enjoined at the instance of plaintiff from proceeding to execute this power.

Also held, That the state cannot be compelled to proceed with the erection of a public building or the prosecution of a public work, by a contractor with whom it has contracted for the erection of the building or the performance of the work. 1 Den., 317. A law of the State, suspending or discontinuing a

public work, or providing for its performance by different agencies than those theretofore employed, is not subject to any constitutional objection, because the change would involve a breach of contract with a contractor who had contracted to do the work. The contractor would have a claim against the state for any damage sustained by him from the breach of the contract, which could be enforced by appeal to the legislature. 43 N. Y., 408.

Judgment of General Term, affirming judgment for defendant, affirmed.

Opinion by *Andrews, J.*

BROKER. PERSONAL LIABILITY.

ENGLISH DECISIONS—COMMON PLEAS DIVISION.

Southwell and another v. Bowditch.

Decided January 15, 1876.

A broker having signed and sent to the plaintiffs a note of a contract in the following terms:—"I have this day sold by your order and for your account to my principals about five tons of pressed anthracene. W. A. Bowditch," is personally liable, in an action for goods sold and delivered, upon the contract.

Declaration for goods sold and delivered; plea, never indebted.

Issue.

At the trial before Lord Coleridge, C. J., at the sittings in London after Michaelmas Term, 1874, the facts, so far as material, appeared to be as follows:—The contract of sale relied on by the plaintiffs was a sold note signed by the defendant, who was a colonial broker, in the following terms:—"Messrs. W. A. Southwell & Co. I have this day sold by your order and for your account to my principals about five tons of pressed anthracene, at five

shillings per cwt. of pure anthracene, to be delivered free to 'Free Trade Wharf' in casks in good export condition. The percentage of pure anthracene for value to be referred to Dr. B. Paul, who is to test in the following manner: [then followed a description of the manner of testing]; payment in cash in fourteen days after delivery, less $2\frac{1}{2}$ per cent. discount and 1 per cent. brokerage. The above anthracene to be made all from coal tar. W. A. Bowditch." It was contended for the plaintiffs that this document amounted to a contract of sale, making the defendant personally liable for the price of the goods delivered under it. It was contended for the defendant that the note did not import personal liability on the defendant's part. The defendant had acted, in buying the goods, as broker for a firm of Bloth & Co. The verdict was entered for the plaintiffs for 325*l.*, leave being reserved to the defendant to move to enter a nonsuit on the ground that there was no evidence to render the defendant liable for goods sold and delivered. A rule *nisi* had been obtained accordingly.

Held, That the document was a contract of purchase and the defendant's signature thereto being unqualified, he is personally liable.

The expressions used in this contract, though they show that the defendant was acting as an agent, must be taken as showing no intention that the defendant should be exempted from the liability that would ordinarily be thrown upon him by law when acting for an undisclosed principal.

It seems that words added by way of qualification to the signature, are entitled to more weight than the same expressions occurring in the body of the instrument.

Rule discharged.

Opinions by *Coleridge, C. J.*; *Grove* and *Denman, J. J.*,

ESTOPPEL. BOUNDARY LINE.
SUPERIOR COURT OF CINCINNATI, GENERAL TERM.

Samuel Burt vs. Frederick Creppel.

Decided October Term, 1876.

A doubtful or disputed boundary line may be agreed upon by parol; and a party so agreeing is afterwards estopped from denying the same, if the other, relying upon it, erects improvements.

B owning a large lot of ground, sold and conveyed a part of it by metes and bounds to S by deed. They agreed upon the boundary line between them, which was probably somewhat different from that which the calls of the deed would establish. S sold and conveyed to C, by the same description as that contained in the deed to S, pointing out the division line that B had shown to S. C commenced to erect a new house upon his lot, when B interposed, and claimed that its wall was upon his lot, being over the line he had pointed out to S, and which S had pointed out to C. C took down this wall, and built according to such pointed out line, B not objecting until after C had completed his house. He then brought ejectment for the strip between the line as called for in the deed, and the line as pointed out. Owing to an uncertainty as to a corner of B's original tract, the division line as given by the deeds, was not certain.

Held, A disputed or doubtful boundary may be agreed upon by parol; and if the parties make improvements upon the disputed ground in accordance with such agreement, they will be estopped from denying the line so agreed upon.

Their respective deeds cover the land up to such agreed line.

Judgment affirmed.

Opinion by *Yaple, J.*

PROMISSORY NOTE. EVIDENCE

N. Y. SUPREME COURT, GENERAL TERM.

FOURTH DEPT.

Nicholson, respt., v. Waful, applt.

Decided January, 1876.

In an action on a note of \$450, evidence that a short time prior to the giving of the note the payee stated he was working for \$1.50 per day, and could not raise \$100, was competent to raise question of plaintiff's (the payee's) "bona fides."

This is an action on a promissory note of \$450, dated April 28, 1873, which plaintiff claims was given to him by defendant.

Defendant denies that he ever gave to plaintiff any note of \$450, and that if he did, it was given while he was intoxicated, and was without any consideration, and was void.

On the trial, defendant offered to prove that in 1870, plaintiff said he had not one hundred dollars; that for some two years he was employed by a firm of millers and received for his services the sum of \$1.50 per day, and out of it had to furnish a house and support a wife; that in June or July, 1872, plaintiff said that he had no funds, and could not raise \$100.

There was a judgment by the referee for plaintiff.

Held, That as defendant was in the attitude of claiming on the trial before the referee that plaintiff had taken advantage of him while intoxicated, and got from him the note (if the note was signed by him), without any consideration therefor, the evidence offered above was competent, in order to satisfy the

referee, if possible, that defendant had received no money on said note. Taking the evidence offered in connection with the fact that when it is claimed the note was given the defendant was intoxicated, a strong inference might be drawn that advantage had been taken of defendant's condition to obtain the note without any consideration.

Judgment reversed.

Opinion by *Mullin, P. J.; Smith and Gilbert, J. J.*, concurring.

LANDLORD AND TENANT.

SUPREME COURT OF PENNSYLVANIA.

Hey v. McGrath.

Decided February 21, 1876.

In Pennsylvania a tenancy at will is construed to be a tenancy from year to year.

Where the sub-tenant purchases the title of the paramount landlord, he is invested with all the latter's rights, including the power to determine the original lease.

Error to the District Court of Philadelphia County.

Ejectment by McGrath against Hey to recover the possession of an office.

On the 16th of April, 1866, one Stone leased the premises in which the office was situated to Hey, for a period not expressly limited, at a specified annual rent, and payable in monthly instalments. The indenture of lease contained the following stipulation:—

"And it is hereby expressly understood and agreed between the said parties of the first and second parts, that at no time, during the continuance of the said party of the second part as a tenant of the aforesaid premises, leased and demised by the said party of the first part, is the aforesaid annual rental

of three hundred dollars, to be in any event increased in amount, but for such period as the said party of the second part may continue in possession of the aforesaid demised premises, as a prompt paying reliable tenant, the amount of rent to be paid upon the aforesaid sixteenth day of each and every month shall in no wise exceed the sum of twenty-five dollars, as aforesaid."

Upon August the 30th, 1870, Hey sub-let the premises to McGrath for the term of one year, reserving to himself, in a written lease, "store room for at least ten compressed bales of cotton, or woolen rags, or paper stock, in any portion of said building, and one office." On December 29th, 1871, Stone conveyed the aforesaid premises to the sub-tenant McGrath; assigned to him also his (Stone's) rights upon the original lease. On January 11th, 1872, a notice to quit the premises was served upon Hey by McGrath; and on December 24, 1872, this action was instituted.

The court instructed the jury that they should find for the plaintiff; and, the verdict and judgment having been given accordingly, the defendant sued out this writ, and assigned for error the charge of the court.

He'd, That the lease in this case was not for life, but at will, which, under our decisions, is a lease from year to year. The plaintiff, McGrath, having purchased the title of the paramount landlord, is invested with his rights, and could determine the lease just as the paramount landlord might. There is nothing in his lease from Hey which would prevent the exercise of this right.

Judgment affirmed.

Per Curiam opinion.

NEGLIGENCE.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Mack, *applt.*, v. The Dry Dock & East New York Railroad Company, *respts.*

Decided March 6, 1876.

If passenger is directed to front platform with his baggage by conductor and remains there, believing himself to be so ordered by conductor, and is there injured, he is not chargeable with contributory negligence.

And that is so, though there is room in ide, and a notice posted conspicuously forbidding riding on front platform.

Appeal from judgment recovered on a non-suit ordered at Circuit.

Plaintiff, who is a German, and who had been in this country but a few days, and who knew but little or nothing of the English language, sought to enter into one of defendant's cars, having a large and heavy trunk with him. The conductor directed him by signs and motions to take his trunk to the front platform, which he did, and understanding that he must stay with it, remained standing there, though there was plenty of room inside. The conductor allowed him to remain on the front platform and there collected the fare of him for himself and trunk; but did not in any way indicate to him that his proper place was inside, or object to his remaining outside. Notices were posted up inside of the car, at either end, forbidding passengers to ride upon the platform. The car collided with the pole of a truck, which was backed up to the curb stone beside the track, and plaintiff's knee cap was dislocated thereby.

Plaintiff testified that the truck was standing so that the pole reached out

over the track, that the car was going rapidly and that the driver made no effort to check it.

Defendant offered testimony to show that the pole was parallel with the track and out of the way, but that just as the car came by the truck, the horses shied at some baskets, bringing the pole around too sudden'y for the driver to avoid the collision.

Plaintiff was non-suited.

Lewis Saunders for applt.

John M. Scribner, for resp't.

On appeal, Held, That it is not necessary to determine now, whether the provisions of the General Railroad Act as to posting notices applies to street cars, but whether it does or not, would not relieve plaintiff from the imputation of negligence if he heedlessly and voluntarily rode upon the front platform. The combined assent of the plaintiff and defendant's conductor, would not justify a violation of the regulations as to riding inside. But the case is far different where he is sent against his will by the conductor to the front platform, by such acts and words as create the impression that he can only ride there, although he may have, in fact, misunderstood the conductor. It has been decided that a passenger on the front platform is not carried at his own risk, if he be there without any fault of his own (38 N. Y., 131).

In this case the conductor might clearly have seen that his instructions were misunderstood, since the passenger endeavored at the outset to enter the car, until he was directed forward. The conductor should have corrected his mistake, and since he had the charge and control of the car, should have informed plaintiff that his proper place was inside. The conflicting testimony

as to the position of the pole of the truck, should clearly have been left to the determination of the jury.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

COSTS.

NEW YORK SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT.

Geo. E. Phelan, et al., *respts.*, v. H. W. Collender, *applt.*

Decided March 31, 1876.

If defendant counterclaims without serving offer to allow judgment for the excess of claim over counterclaim, plaintiff is not bound to enter judgment for such excess in order to avoid costs, but may test the counterclaim, and if he recover \$50 is entitled to full costs,

Appeal from order of Special Term, denying motion to set aside plaintiffs' costs, and to award costs to defendant. This action was brought to recover the sum of \$1250, due the plaintiffs by way of rent. Defendant admitted the claim, but set up a counterclaim for \$1,084.65, which plaintiffs denied.

The jury found for defendant the amount of the counterclaim, and a verdict was thereupon entered for plaintiff for \$219.47, the excess of the amount claimed over the counterclaim. Defendant presented to the clerk of the court for taxation a bill of costs, claiming that as the only issue raised was as to the counterclaim, and that as to that the jury found for him, therefore he was entitled to costs. The clerk refused to tax the bill, but taxed the costs for plaintiff.

From the order of Special Term, denying the motion to set aside plaintiffs'

costs and to allow the defendant's, this appeal is taken.

Geo. Stevenson for resp't.

Michael Nolan for appl't.

On appeal, Held, That costs can only be given as allowed by statute. The Code, by sec. 304, provides that if the plaintiff in an action for the recovery of money, recovers \$50 or over he is entitled to costs, and by sec. 305, that defendant has costs whenever plaintiff is not entitled to them. The defendant may, however, under sec. 385, offer to allow judgment to be taken against him for a sum specified, and costs, and if the plaintiff does not accept this, and gets no more favorable judgment, he must pay defendant costs from the time of the offer.

If, however, the defendant interposes a counterclaim, plaintiff may (sec. 246 of Code) enter judgment for the excess of his claim over the counterclaim, but he is not bound to do so. He may contest the validity of the counterclaim without incurring any penalty therefor, but if with the counterclaim defendant serves the above offer, plaintiff contests the counterclaim at the risk of costs.

No offer was served in this case, and plaintiffs are entitled to costs. Order affirmed.

Opinion by *Brady J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

LEASE. CROPS.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Reeder, et al., resp'ts., v. Sayre, appl't.

Decided January, 1876.

The provision of law that an agreement not to be performed within one year is void, does not apply to contracts for leasing lands.

Parol lease, how it affects tenant from year to year.

Tenant holding over; tenant sowed crop under an agreement; the landlord afterwards sold; tenant may reap.

Notice.

This was an action of trover.

In 1871 plaintiffs made a parol contract with one T to lease of him his farm of 120 acres for the term of two years, from April, 1871, with the privilege of two crops of wheat at a yearly rental of \$500.

The crop of wheat for which this action was brought, was sowed in fall of 1872, the ground being prepared in September of that year.

On the 1st June, 1872, T entered into a written contract with the defendant, whereby he sold the said farm to the defendant, T agreeing to give defendant a warranty deed of farm, free from incumbrance and possession thereof, on April 1, 1873. T afterwards executed the deed, and defendant in April 1, 1873, went into possession.

A few days after the contract of T and defendant was made, and before any preparations was made by plaintiffs to sow the crop in fall of 1872, defendant served a notice on them forbidding sowing same, &c., &c. The defendant harvested the wheat. Plaintiffs forbid it, and this action was then brought for the value.

T swears that when he sold he talked with defendant, that plaintiffs were still to have some privileges.

There was a judgment for plaintiffs.

Jeremiah McGuire, for resp't.

Spicer & Baker, for appl't.

Held. It may be assumed as settled law in this State, 1. That the provision of the revised Statutes (2 R. S., 135, § 2, Sub. 1.) which avoids every agreement that by its terms is not to be per-

formed in one year, does not apply to contracts for the leasing of lands—(Young v. Duke, 1 Seld., 461: overruling Crowell v. Crane, 7 Barb., 191,) and 2nd, that a parol lease for more than one year, though void for the term by reason of another statute (2 R. S., 125, §§ 8-9), inures as a tenancy from year to year, and that the oral lease regulates the term of the tenancy in all respects, except its duration. In this case the lease was valid only for one year from April 1, 1871, yet the tenants having actually entered under the lease, and having continued in the occupation of the demised premises after that time, with the assent of the lessor, a valid tenancy for another year was created (Schuyler v. Leggett, 2 Cow., 660; People vs. Rickert, 3 id., 226; Lounsbury vs. Suydam, 31 N. Y., 514). By the terms of the parol agreement in this case, the tenants became entitled to sow a crop of wheat in the fall of 1872, and to reap it the following season. They sowed the crop accordingly, and we are of opinion that they had a right to reap it and carry it away. The privilege of sowing the crop was exercised by the tenants as such, with the sanction and assent of the lessor. These facts are sufficient to establish a new contract, or that which is equivalent thereto, whereby the grant of the privilege made by the original agreement revived (Like vs. McKinstry, 41 Barb., 191. S. C., 4 Keyes, 397). The invalidity of the original demise is no objection to the new contract. The case of Dung vs. Parker, 52 N. Y., 494, does not affect this principle, and the principle is supported by the case of Harris vs. Frink, 49 id., 24.

The defendant took his conveyance with notice of the right to take off the crop claimed by the tenants, and it was

subject to that right. For obvious reasons it is immaterial to enquire whether he had such notice when he entered into the executory contract for the purchase of the land. The right of the tenants was vested, and not a mere revocable license, and the defendant acquired by virtue of the contract no greater interest than his vendor could then sell.

We entertain no doubt that the judgment should be affirmed.

Opinion by *Gilbert, J.*; *Mullin, P. J.*, and *Smith*, concurring

VERDICT BY COMPROMISE. RAILROAD REGULATIONS. IMPROPER CONDUCT OF ATTORNEY.

SUPREME COURT OF INDIANA.

The St. Louis & Southwestern Railroad Co. v. Myrtle.

Decided March, 1876.

In an action to recover unliquidated damages, the jury may resort to means to arrive at a verdict that are not allowed in actions where the damages are liquidated.

A railroad company have a right to require all persons to procure tickets before entering the cars.

To make the improper conduct of an attorney, in going outside the evidence and making improper comments available as error, the Court must be called upon and refuse to stop counsel.

This was an action by the appellee to recover damages for an alleged injury and ejection from the cars of the appellant. The complaint is in two paragraphs. The first alleges that it was a rule of the company not to permit passengers to travel on freight trains without tickets, and that plaintiff entered the cars of the company, but was unable to first procure a ticket, be-

cause the ticket office of the company was not open before the train passed. That upon his failure to furnish a ticket, he tendered his fare to the conductor, who refused to receive it, but with force expelled him from the train, etc.

The second paragraph is substantially as the first. Verdict for plaintiff for \$562.50.

Held, 1. That in an action to recover unliquidated damages, the jury may resort to means to arrive at a verdict that are not allowed in criminal actions, or in a civil action where the damages are liquidated; and that if it did appear that the verdict for \$562.50 was the result of a compromise, it would not vitiate it.

2. That the appellant had a right to adopt a regulation that all persons who travel on a freight train should procure a ticket before entering the cars. But such a regulation imposes the duty upon the company of having the ticket office open sufficiently long enough before the departure of the train to enable passengers to procure tickets.

3. That the expulsion of plaintiff from the train was wrongful, and that after careful consideration the verdict cannot be disturbed on account of excessive damages.

4. That in order to make available as error the improper conduct of an attorney, in going outside of the evidence and making improper comments in his argument to the jury, it must appear that objection was urged to such argument, or that the court was called upon to stop counsel and confine him within the record, and that the failure of the court to interpose, when opposing counsel are present and do not ask the interposition of the court, or object to the line of argument, will not entitle the party to a new trial.

Judgment affirmed.

Opinion by *Buskirk, J.*

BILL OF PARTICULARS.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Corbett, *respt.*, vs. Trowbridge, et al.,
appls.

Decided March 31, 1876.

Appeal from order denying further bill of particulars.

This action was brought to recover for professional services rendered by plaintiff at attorney and counsel for the defendants, in their administration of the estate of one George Harden, deceased. After service of the complaint, defendants duly demanded a bill of particulars, and thereafter received from the plaintiff a statement containing the items of services, many of which were rendered on the same day, without giving the price charged for any of such services, but at the end stating that the items "set forth are charged for at twenty thousand dollars." Defendants applied at Special Term for an order requiring plaintiff to specify the charge for each item of service separately.

Motion denied.

R. H. Corbett, in person for *respt.*

G. L. Ingraham, for *applt.*

On appeal, Held. That defendants are entitled to specific statements of each service, date of rendition and sum charged; if not for each item, certainly for those occurring upon the same day. They should not be required to be prepared to resist all the charges by proof of their value, when, if the sum claimed for each were specified, it might, in many instances, be consented to. The bill is to advise the defendant of what he is called upon to pay, and should assimilate in theory and practice to the bill of a merchant for goods delivered.

Order reversed, and an order entered

directing the service of the further bill of particulars demanded.

Opinion by *Brady, J.; Davis, P. J.,* and *Daniel, J., concurring.*

NOTICE OF PROTEST.

N. Y. SUPREME COURT, FIRST DEPART.

Greenwich Bank of the City of New York *respt.*, vs. Theodore De Groot, et al., *appls.*

Decided March 6, 1876.

Looking in the directory merely for the address of an indorser is not making that diligent inquiry which the statute requires.

Appeal from judgment recovered at circuit.

In November, 1872, W. H. De Groot made his promissory note to the order of Theodore De Groot, who thereafter endorsed and delivered it to one McLean, thereafter passing through different hands it came into the possession of plaintiff. At maturity it was not paid, and was therefore duly protested.

The Notary who protested the same deposited the notice to Theodore De Groot as endorser, in one of the street postal boxes, directed to the address found in the directory. No further enquiries or efforts were made to learn if that was in fact the right address. The defendant served with his answer an affidavit denying his receipt of such notice as provided by the statute.

Wm. G. Wheelwright for *respt.*

E. Haines for *applt.*

On appeal held, That the only question before us is whether that degree of diligence in ascertaining endorser's address, as required by the statute, was shown, by simply looking into the directory and then finding what appeared to be the endorser's address and mailing the notice thereto. The law requires, in order to charge an endorser, such

reasonable diligence as men of business usually show when their interests depend upon correct information. The holder must act in good faith and not give credit to doubtful intelligence when better could have been obtained. (21 Wend., 643.)

And until some one is found who professes to be able to give the required information it will not do to stop short of a thorough inquiry at places of public resort, among those most likely to know of the endorser's residence. (3 Hill, 520; 2 Sandf., 178,) and each of the other parties to the paper, when they may be accessible. (16 N. Y., 235.)

The statements in the directory afforded the opportunity for, and suggested further enquiry; without making which the Notary could not properly act, save at his peril.

In this case the proper degree of diligence was not shown.

Judgment for the endorser, Theodore De Groot, reversed and new trial ordered.

Opinion by *Daniels, J.; Davis, P. J.,* and *Brady, J., concurring.*

USURY.

SUPERIOR COURT OF CINCINNATI, GENERAL TERM.

Hubbell, plttf. in error, v. *Mansfield* *deft. in error.*

Decided October, 1875.

In order to avail himself of usury in a mortgage, a party other than the mortgagor must assert an interest in the mortgaged premises.

This petition in error is prosecuted here by Hubbell to reverse a judgment and order for the sale of mortgaged premises rendered in this court in special term in favor of Mansfield against one Weiler, the sum found due being \$2,284.94. The notes, which

were negotiable, with others, and the mortgage, were made by Weiler to McGuffey, and by him assigned before due to Mansfield.

In the petition to foreclose the mortgage Hubbell was made a party defendant, the averment as to him being that plaintiff is informed and believes that Hubbell claims some lien upon or interest in said mortgaged property, or some part thereof, of the precise nature of which claims plaintiff is not informed. The prayer was that Hubbell be made a party defendant and required to answer, etc. Hubbell was duly served with process, but filed no answer and made default. Hubbell claims that the decree shows that usurious interest is included in it, and that it is made to draw a usurious rate of interest.

Held, That Hubbell does not appear to have any interest in the premises or any part thereof, which he must have to be entitled to attack the decree upon the ground of usury. Weiler, the debtor, could waive usury, and he must be held to do so until he files his petition in error.

Hubbell's default was, in legal effect, an admission that he had no interest in the premises to be protected against any decree that might be rendered against Weiler for usury.

Judgment affirmed with costs.

Opinion by *Yaple, J.*

BANK CHECK. PRESENTMENT. REASONABLE TIME.

SUPREME COURT OF ERRORS OF CONNECTICUT.

David P. Woodruff v. Amzi P. Plant.
Decided February, 1876.

The holder of a bank check is bound to present it within a reasonable time, but what is a reasonable time depends upon the particular circum-

stances of each case, the time, the mode, and the place of receiving the check, and the relations of the parties.

The time for presentment may be extended by the assent, express or implied, of the drawer.

Assumpsit upon a bank check brought to the Court of Common Pleas for Hartford County. The court made a finding of the facts and reserved the case for the advice of this court.

The parties to this suit resided in Southington, twenty-two miles from New Haven. They met together on the morning of the 24th of March 1873, and in the settlement of some business transactions, the defendant gave the plaintiff his check for \$40 on E. S. Scranton & Co., a banking company in New Haven. The plaintiff then requested the defendant to give him another check for \$425, counting out to him bank bills to that amount. The reason of the request was, that the plaintiff was indebted to one Goodwin, who resided at Lime Rock, in Litchfield County, to whom he was about making a remittance, and he preferred to make it by a check rather than by bills. There was no bank at Southington. The plaintiff deposited the \$40 check that day at a bank in Meriden, where he kept his bank account, and on the next day it was presented for payment and duly paid. The defendant gave the check for \$425, as requested, taking bank bills of the plaintiff for that sum, which, with \$125 more, the defendant, on the same day, deposited with Scranton & Co., on whom the checks were drawn. The plaintiff, on the same day, enclosed the check for \$425 to his creditor, Goodwin, at Lime Rock, who received it the next day, the 25th, and immediately deposited it in the National Iron Bank of that vil-

lage for collection. This bank, by the next mail after its receipt, sent it to a bank in New Haven for collection, which bank received it on the afternoon of the 26th of March, and early on the morning of the 27th, presented the same for payment, which was refused, —the banking house of Scranton & Co. having failed and closed its doors on the 26th. The check was duly protested for non-payment, and the requisite notices were given to all parties. The plaintiff paid Goodwin the amount of this check, and brings this suit to recover it from the defendant, who was the drawer.

Held, There can be no dispute as to the law regarding the presentment of a check for payment in order to charge the drawer in case of dishonor. The holder is bound to present it within a reasonable time, and to give notice thereof within a like reasonable time; otherwise the delay is at his own peril. What is a reasonable time will depend upon circumstances, and will, in many cases, depend upon the time, the mode, and the place, of receiving the check, and upon the relations of the parties between whom the question arises. Here three days only elapsed between the giving of the check and its presentment for payment.

The particular circumstance attending this case we consider very important. The defendant knew that the plaintiff desired this check to make a remittance; that it was not to be immediately presented for payment; and would not reach the bank for several days. The case of *Daggett v. Whitney*, 35 Conn. 366, is certainly an authority to show that what the understanding of the parties was at the time that the check was drawn and delivered enters into the contract. That the

time for presentment may be extended by the assent of the drawer, express or implied, is well settled. Here the time for presentment was extended by the assent of the drawer, not for a definite time, certainly, but for a reasonable time; and we are quite clear that a reasonable time had not expired when this check was presented for payment and dishonored.

We think the plaintiff is entitled to recover, and so advise the Court of Common Pleas.

Opinion by *Foster, J.*

EVIDENCE. PRACTICE.

N. Y. COURT OF APPEALS.

Clark, *applt.*, v. Donaldson, *respt.*

Decided February 8, 1876.

Upon an issue as to whether defendant was the owner of a stock of goods which he claimed he had sold by verbal agreement, conversations between defendant and the alleged vendee, at the time the property was sold, are competent evidence.

Evidence improperly received must work an injury to justify a reversal. Where evidence which has been erroneously rejected is afterwards admitted the error is obviated.

Where evidence was received, "subject to objection," and the objecting party having taken no exception then, or subsequently, it cannot be considered on appeal.

This action was brought to recover money received by defendant on plaintiff's account and for rent claimed to be due from defendant. Plaintiff claimed that defendant purchased plaintiff's interest in a certain business in which he was engaged, and they agreed that the old books of account of plaintiff should remain at the store, and that plaintiff should not send out any bills for collection, and that defendant should collect the bills, continue to deal with the customers, and account to plaintiff for

his share of the bills; that in accordance with this agreement the books were left with the defendant. Defendant denies any agreement on his part to collect or account, or that he made any collection, but allowed that he made a purchase for the benefit of his son Thomas, and one B, his brother-in-law, it being agreed they should purchase of him and carry on the business, and from the proceeds pay all debts and expenses, and from the profits pay defendant the cost of the same; and that they were to carry on the business under the firm name of Thomas Donaldson & Co.; that this was known to plaintiff; that he had no interest in the firm, and all collections made were made by them.

Upon the trial defendant offered proof of a conversation between Thomas and himself, when he sold the property to him. This was objected to, and the objection was overruled.

Thomas Nolan, for applt.

Francis Tillou, for resp't.

Held, no error. That as the sale was by verbal agreement, and parol proof of the transaction was the only evidence that could be given on the subject, it was competent to show that defendant did not conduct this business, that being a fact in issue by the pleadings, and proof that defendant after he purchased sold the stock to one of the persons in whose name the business was afterwards carried on, was competent upon this issue.

Defendant was asked the question: "Explain more fully what you meant by saying that you stated the case to Thomas and Barker, and gave them possession and told them to go on?" This was objected to and the answer taken under exception. The witness had testified before upon the same sub-

ject without objection, and his answers were substantially the same.

Held, no error. That no injury resulted from the repetition of the testimony.

Defendant was asked on his cross-examination: "At that interview (referring to a conversation between the witness and Thomas and Barker) you claim that the partnership between Thomas and Barker was organized?" This question was objected to by defendant's counsel and the objection sustained. No ground of objection was stated. The witness was allowed immediately afterwards to state that the co-partnership agreement was made on that occasion.

Held, That this obviated the error in sustaining the objection to the previous question.

One D, a witness on the part of the plaintiff, was allowed to testify that he had sold goods to one R. D. for the store after plaintiff had sold the stock to defendant. This witness had testified that plaintiff introduced said R. D. to him as his successor in business, and as to the manner of conducting the business after the plaintiff sold out.

Held, That this evidence was competent upon the question whether the business was plaintiff's or R. D.'s. Upon objection being made by plaintiff to certain evidence offered, the case states it was received by the referee "subject to objection." Plaintiff did not except or insist on a definite ruling upon the admissibility of the evidence offered at the time or subsequently.

Held, That as there was no exception which raised the question as to its competency it would not be considered.

Judgment of General Term, affirming judgment on report of referee dismissing complaint, affirmed.

Opinion by *Andrews, J.*

MASTER AND SERVANT. WHEN MASTER LIABLE FOR TORT OF SERVANT. WILLFUL ACT.

N. Y. COURT OF APPEALS.

Rounds by Guardian, *respt*, v. The Del., Lack. & W. R. R. Co., *applt*.

Decided February 8, 1876.

A willful act which will exempt a master from liability for the tort of his servant, is in its legal sense malicious also.

In an action for negligently and carelessly ejecting plaintiff from a railway car, whereby he was unnecessarily injured, it is no defence that he was a trespasser upon the car.

The rule governing the master's liability for the torts of his servant, in the course of his employment, in using force towards or against another, stated.

The master is not liable for the willful and malicious act of the servant.

This action was brought to recover damages for injuries received by plaintiff, by being pushed off of one of defendant's cars. It appears that plaintiff, in violation of defendant's rules, got upon the rear platform of the baggage car of a train that was standing in the depot in order to ride down to a round house near by, into which the cars were to be backed to make a new train. On one side of the track was piled wood for over 100 feet. After the train had started defendant's baggage master, who had charge of the train, discovered the plaintiff and ordered him to get off, the latter told him he could not without his help on account of the wood, and the baggage master thereupon kicked him off the car, so that in falling his chest hit against the wood pile and he rolled over under the cars, which passed over and crushed one of his legs. The court charged the jury that although plaintiff was a trespasser, yet if the baggage-master in pushing him off the train acted as the employee of defend-

ant, in good faith, and in the discharge of a duty he owed it, defendant would be responsible for his carelessness and negligence, but if he acted wilfully and maliciously, then he alone would be responsible. The judge refused to qualify this charge or to charge that it was sufficient to exempt defendant from liability, that the act of the baggage-master was wilful.

E. H. Prindle.

Francis Kernan.

Held, no error. That a wilful act which will exempt a master from liability for the tort of his servant, is in its legal sense malicious also. The intentional doing of a wrongful act without cause or excuse, is malicious (9 Metc., 93; 4 Mason, 115). That the court could not say from the evidence that the baggage-master acted outside of and without regard to his employment, or designed to do the injury, or that the act was wilful, that this question was properly left to the jury (47 N. Y., 274). The fact that the plaintiff was a trespasser was no defence, he was entitled to be protected against unnecessary injury by defendant or its servants, in exercising the right of removing him (23 N. Y., 343; 9 Al., 557; 12 id., 580). When authority is conferred on a servant by a master to act for him, without special limitation, it carries with it by implication authority to do all things necessary to its execution, and when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and when exercised becomes as to third persons the discretion and act of the master, and this, although the servant departed from the private instructions of the master, provided he

was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability that he expressly authorized the particular act and conduct which occasioned the injury. It is in general sufficient to make the master liable that he gave his servant authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in performing his duty or inflicted an unnecessary injury in executing his master's orders.

Also held. That if a servant under guise of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly for the purpose of accomplishing his own independent, malicious or wicked purpose, does an injury to another, the master is not liable. When it is said that the master is not responsible for the willful wrong of his servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service or for the purpose of executing his orders.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Andrews, J.*

MASTER AND SERVANT.

PENNSYLVANIA SUPREME COURT.

Fox v. Dougherty.

Decided March 6, 1876.

The [relation of master and servant

exists between the proprietor of a theatre and a star performer, and the former is liable for the negligence of the latter, whereby a spectator is injured.

Certificate from Nisi Prius.

The narr. averred that the defendant was the proprietor and manager of a certain company of dramatic and gymnastic performers, then employed and used by him in exhibiting plays and feats of skill to which the public was invited to witness performances, upon the payment of a certain reward; that the plaintiff was admitted to the theater on April 20, 1869, having first paid defendant a certain reward in that behalf, safely and securely to witness the plays and feats of skill of defendant's company of performers, and that it became and was defendant's duty to use proper care that plaintiff should witness said performance in safety and security. Breach, that defendant did not use proper care in the premises, and suffered performers to be inexperienced, whereby one of said performers, while performing a feat, fell upon and injured him. Plea, Not Guilty.

Upon the trial it appeared that the plaintiff, having purchased a ticket, entered Fox's American Theatre, and took a seat immediately in front of the stage. During a trapèze performance by two performers, called "Flying Men," who were star performers engaged by defendant by the week, at thirty dollars a week, one of them missed his hold upon the ropes for some unexplained reason, and fell from the height of twenty-five feet upon the plaintiff, who, in consequence thereof, was confined to the house for five weeks, having one rib fractured, and sustaining a contusion of the chest and spine. The plaintiff contracted a doctor's bill of \$25, which he did not pay, and a

small bill of medicines, and was prevented from plying his trade as a peddler of stationery for six months.

The defendant requested the court to instruct the jury :

1. "That if the defendant engaged a star performer to exhibit feats of strength and skill, but in no way interfered with the performer in those exhibitions, and if the ropes used in such performances were put up under the direction of professional gymnasts, and not under the direction of the defendant, then the relation of master and servant did not exist between the defendant and the performers, and he would not be liable for their unskillfulness in such an exhibition." *Answer.* "If these performers were employed by the defendant as proprietor of the establishment, the relation of master and servant did exist between them, and he would be liable for an accident resulting from their unskillfulness, unless such accident was one which an ordinarily prudent man could not foresee.

2. "That if the plaintiff knew of the kind of performance he was going to witness, and procured a seat which was underneath the place where the performer was to leap during the exhibition, he was guilty of contributory negligence." *Answer.* "Affirmed, provided that, to an ordinarily prudent person, it would be obvious that the seat was a dangerous one."

3. "That if the performers made their own selection of feats, and were not under the immediate direction of the defendant, and the accident which occurred to one of these performers was without the fault of the defendant, the plaintiff cannot recover." *Answer.* "If the feats were such as were likely, from their character, to prove dangerous to the audience, the defendant was

bound that they should be performed without danger to the audience flowing from the want of skill or care in the performers. But we have already said that he would not be answerable for accidents which reasonable prudence could not foresee."

The Court also charged the jury that "a duty was raised which the defendant was bound to discharge in favor of the plaintiff—that was, that the plaintiff should be secured, while at the exhibition, from all harm that might result from the carelessness or negligence of his employés or performers, or from any known or obvious defect of the various structures or machinery employed." "Was there anything in the arrangement of the trapèze which occasioned the accident, and which an ordinarily prudent man might have foreseen and remedied; or were the performers unskillful or negligent, and did the accident result from that cause? In either case you should find for the plaintiff."

The jury, under these instructions, found a verdict for the plaintiff for \$500, and, judgment being entered thereon, the defendant certified the case to this Court, assigning for error the answers and charge of the Court, as above given.

The Judges who heard this opinion being equally divided in opinion, the judgment of the *Nisi Prius* stands.

Per curiam opinion.

RAILROAD BONDS.

U. S. CIRCUIT COURT—DISTRICT OF LOUISIANA.

Henry R. Jackson *vs.* the Vicksburg, Shreveport and Texas Railroad Company, et al.

Decided March 1876.

Railroad bonds payable to bearer, with the place of payment left blank, and

the amount of principal and interest secured thereby indefinite and uncertain, are not negotiable.

And where the President is authorized by endorsement to name the place of payment whereby the amount secured is made certain, and endorses the bonds but leaves the place of payment blank, an innocent holder acquiring possession from a thief is not authorized to fill the blank.

This cause was heard upon exceptions filed to the report of the master.

In April, 1864, during the late war carried on by the United States against the seceding States, the bonds in question were in the office of the railroad company at Monroe, Louisiana. During the month just named, a raid was made upon Monroe by the naval forces of the United States, and at that time the office of the company was broken open, and these bonds carried off by persons connected with the expedition, without the consent or knowledge of any of the officers of the company. In short, the bonds were stolen from the office of the company. They were afterwards put in circulation and bought by the holders at from fifteen to twenty cents on the dollar. The face of the bonds certified that the Vicksburg, Shreveport and Texas Railroad Company is indebted to John Ray or bearer, for value received, in the sum of either two hundred and twenty-five lbs. sterling, or one thousand dollars lawful money of the United States of America, to wit: two hundred and twenty-five pounds sterling, if the principal and interest are payable in London, and one thousand dollars lawful money of the United States of America, if the principal and interest are payable in New York or New Orleans, which sum said company promises to pay to John Ray or bearer, on the first day of September, A. D. 1877, and also to pay an in-

terest thereon at the rate of eight per cent. per annum on the first day of March and the first day of September of each and every year; * * * and the President of said company is authorized to fix by his endorsement, the place of payment of principal and interest, in conformity with the tenor of this obligation. The bonds were signed by the President and the Treasurer, and bore the seal of the company.

Upon the back of each of the bonds in question, was an indorsement as follows: "I hereby agree that the within bonds and the interest coupons thereto attached shall be payable in——"

C. W. YOUNG,
President."

The coupons attached to said bonds declared that, "The Vicksburg, Shreveport & Texas Railroad Company will pay the bearer hereof (on a specified date) nine pounds sterling if payable in London, or forty dollars if payable in New York or New Orleans." Upon this state of facts, the question for solution is, whether the bonds are good in the hands of *bona fide* holders for value. If the bonds are negotiable this inquiry must be answered in the affirmative.

Held, 1. Generally bonds issued by a corporation and payable to bearer, have the qualities of negotiable instruments.

But here the amount for the payment of which the bond is given is uncertain. It is clear that the sum of two hundred and twenty-five pounds, payable in London, with nine pounds interest payable every six months at the same place, is entirely different from one thousand dollars, payable in New York or New Orleans, with forty dollars interest payable semi-annually at the same places. This un-

certainly, unless cured, deprives the bonds of their character as negotiable instruments.

2. That the holder could not fill the blank left by the president and thus render the amount certain. It cannot be said that the holder was expressly authorized to fill the blank, still less can it be claimed that, when the president signed the endorsement and left the place of payment blank, he authorized any one who might steal the bonds, or to whom the thief might sell them, to fill the blank. If any one was authorized by implied contract to do it, it was some one to whom the company had regularly issued the bonds. The uncertainty as to amount of principal, interest and place of payment deprives the bonds of the quality of negotiable instruments.

Exceptions to master's report rejecting these bonds overruled, and report confirmed.

Opinion by *Woods, J.*

EJECTMENT. NEW TRIAL.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Towle, respt., v. Dewitt, appt.
Decided March 6, 1876.

Application may be made in ejectment suit by defeated party within three years after judgment entered to vacate judgment and for new trial.

Party having entered judgment in his own favor irregularly is not allowed to question its regularity for the purpose of defeating a motion to vacate judgment and for new trial.

Appeal from order of special term vacating judgment in ejectment, and granting new trial on payment of costs.

In 1869 this action in ejectment was brought, and tried in 1873.

Plaintiff, after putting in certain maps and documentary evidence, requests the court to charge in his favor, which was refused. Plaintiff then rested. The complaint was dismissed,

and judgment for the defendant was entered as follows:

"This action having been brought to a trial by jury on the 27th day of March, 1873, and a verdict having been found for the defendant herein, it is now, on motion of Field & Shearman, attorneys for defendant herein, adjudged that the complaint be dismissed upon the merits of the action, and that the defendant, DeWitt, recover of the plaintiff Jeremiah Towle, \$357.18 costs of this action."

Within three years from the rendition of judgment, as provided by statute, the motion was made to vacate the judgment herein, and for a new trial on payment of costs, which was granted.

On appeal,

Held, That the plaintiff having made this motion upon an affidavit setting out the proper facts and within three years, he was clearly entitled to this relief from the judgment entered. (2 R. S., 309, secs. 36-37.) Defendant, however, to prevent this, while the judgment still stands of record and of full force, claims that it was improperly entered upon a non suit of plaintiff and not upon a verdict.

It is evident that the judgment in the form in which it now appears was irregularly entered, but it was done by defendant's own attorney and in his behalf. While the judgment thus stands of record it imports absolute verity, and the defendant having taken no steps to open and correct it, stands in the position of seeking to impugn the record for the purpose of defeating this motion, and to maintain it in its present form for all other purposes. This cannot be done. The judgment stands as entered by defendant, nearly three years ago, and if this motion were defeated for the reason given by defendant, the judgment would still remain in full force, and plaintiff would have lost by lapse of time his right to assail it for irregularity.

Order affirmed.

Opinion by *Davis, P. J.*; *Daniels* and *Brady, J. J.*, concurring.

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[No. 12.]

ORDER OF ARREST.

GENERAL TERM SUPREME COURT. FIRST DEPT.

. William Liddell, *respt.*, agt. William Paton, *et al.*

Decided January 28, 1876.

The Court will look into the facts and determine whether an order of arrest should be vacated the same in a case where the ground of arrest and the cause of action are identical as where they are not.

In order to sustain an order of arrest in an action for money obtained in a fiduciary capacity, it must appear that there was an obligation on the part of the person retaining the money to hand over the identical money received.

Where there is an account between the parties, and interest is allowed on balances, an arrest cannot be sustained in an action to recover the balance of account.

Appeal from an order denying the defendant's motion to set aside an order of arrest.

The cause of action set forth in the complaint is alleged to have arisen out of the sale of goods consigned by the plaintiff to defendants as factors for sale on his account, and by them sold and the proceeds received, and instead of being remitted, according to their agreement, withheld by them from the plaintiff.

The affidavit upon which the order of arrest was obtained alleged various consignments by plaintiff, a merchant of Belfast, Ireland, of goods to defendants, merchants in New York, to be sold by defendants, pursuant to an agreement by which plaintiff was to consign goods to defendants as factors

for sale, defendants to receive 12½ per cent. upon the selling price of all goods sold as a commission for making sales, 2½ per cent. of said commission being a *del credere* commission for guaranteeing payment of the price by the parties to whom the sales were made. That defendants had rendered an account of sales, with the prices received, which acknowledged a balance due plaintiff after deducting the commission agreed upon of \$8,996.02.

The defendant's moving affidavit for the purpose of vacating the order of arrest, admitted the consignment of the goods, and the rendering the account of sales, but stated that according to usage and custom in the defendants' business with plaintiff and others, the monies received for sale of goods of different parties were never kept distinct; that the prices for which the plaintiff's goods were sold were credited to plaintiff's account; that there was no understanding that the identical proceeds of the goods were held in trust, or that the proceeds were held by defendants in any fiduciary capacity; but that the balance due plaintiff was an ordinary indebtedness upon contract; that in their dealings interest had been allowed plaintiff on balances in defendants' hands; that for a portion of the indebtedness sued on plaintiff had extended the time of payment by the receipt of time acceptances of defendants; that the claim sued on was discharged by a composition made with the creditors of defendants under the provisions of the Bankrupt Act. There was some conflict with reference to the arrangements under which the consignments were made, and plaintiff acted; but it was stated in the affidavit of plaintiff's attorney, in opposition to the motion to vacate the order of arrest, that the accounts of defendants

showed allowances by way of interest to plaintiff upon balances in defendants' hands.

It was urged below by plaintiff's counsel that the action being to recover money held by defendants in a fiduciary capacity, that an execution might be issued against the person of defendant if no order of arrest had been obtained, and urged also that the question as to whether the defendants actually received the money in a fiduciary capacity or not being the question which the jury was to determine, it could not be tried in advance upon affidavits.

S. P. Nash, for applt.

Benj. G. Hitchings and *H. F. Pultz*, for resp't.

Held, That even if the cause of action and of arrest were identical, which they were not, as the determination of the question as to whether or not the money was held or received in a fiduciary capacity, was not necessary to a recovery, still a motion to vacate the order of arrest was proper, and the court will look at the facts before it and determine whether the order of arrest should be sustained or not alike in cases where the cause of action and of arrest are identical as well as in cases where they are not. In this case, however, although the facts alleged in the affidavit upon which the order of arrest was obtained, were sufficient, if uncontroverted, to sustain the order; two of the defendants positively deny the facts alleged concerning their obligation to pay over the identical money received by them. And their statements upon this subject were sustained by the form of the accounts shown to have been rendered to the plaintiff during the progress of the business, by which accounts it appears that the moneys received were made a matter of credit to the

plaintiff, upon which interest was allowed for the balances in the defendant's hands. This view is fortified by the acceptances taken by plaintiff at the time of defendant's embarrassment, as well as the statement in the affidavit of plaintiff's attorney, with reference to the allowance of interest by defendants on balance due plaintiff. The facts seem to give the defendants the preponderance of proof.

Order appealed from reversed with \$10 costs.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concur in result.

HIGHWAY. OBSTRUCTIONS.

N. Y. SUPREME COURT, GENERAL TERM.
FOURTH DEPARTMENT.

Baxter, resp't. v. Warner, applt.

Decided January, 1876.

The fact that a street is laid out with sidewalks, gutters, &c., and used by the public, is prima facie evidence that it is a street for public use, &c.

Obstructions to highway.

Liability of party interfering with public highway.

This action was brought, originally, in a justice's court, for damages to plaintiff's horse harness, &c.

The defendant, having a ditch or sewer to dig, applied to one R. to do the work. R. hired a man to help him. They partly completed the work and passed into Lansing street, and at night left a part of the ditch open, but protected by a barricade of boards. They left no light at the barricade. Plaintiff, in passing along the street with his horse and buggy, got his horse into the ditch; the horse ran away, and the damage sued for was incurred.

There was no direct evidence that Lansing street was a public street, but it appeared that it was guttered, curbed, and had sidewalks.

The night of the accident was dark.

There was a judgment for plaintiff.

S. W. Lindsley, for applt.

Wm. H. Davis, for respnt.

Held, We think the evidence was sufficient *prima facie* to show that the accident occurred upon a public highway. Lansing street evidently had been laid out as a public street, with a carriageway, sidewalks, gutters, &c., and it was in constant use as a street. These things would not ordinarily exist unless it was a street provided for public use, by competent authority, and subject to public control and supervision. Indeed, the charter of the city, recognized the existence of the street, and the provision relieving the city of the control of a portion of it does not detract from the character of any part of it in actual public use as a highway. The defendant, therefore, had no right to do anything, himself, or to cause anything to be done by another, whether servant or contractor, which rendered the street less safe than formerly. It is immaterial to inquire whether Reynolds was a contractor or a servant; he was employed by the defendant to dig the ditch in the street, and the injury is attributable to that act. The rule deduced from the maxim *respondet superior*, which exempts an employee, does not apply to cases where the injurious act is the very act which the contractor was employed to do, or a necessary consequence of the work committed to him. Here the defendant shows no legal authority for making the opening in the street. It was an illegal act. That act necessitated the obstruction of the street by barriers, to prevent travelers from falling into the ditch, and these barriers being left in the nighttime without lights, were the immediate cause of the accident to the plaintiff.

The defendant cannot escape liability for the doing of such acts by proving that he made a contract with another to do them, and that they were actually done by the latter and not by himself. (*Ellis v. Sheffield Gas Cons. Co.*, 2 Ell. & Black, 767; *Gray v. Pullen*, 5 Best & S., 970-981; *Pickard v. Smith*, 106 B. (N. S.) 480; *Mersey Docks v. Trustees*, L. R. 1 H. of L., 114; *Storrs v. City of Utica*, 17 N. Y., 104; *Congreve v. Smith*, 18 id., 79.)

The question of the contributive negligence of the plaintiff was one of fact, and we think it was submitted to the jury in a manner quite as favorable to the defendant as the evidence warranted.

The judgment and order denying a new trial should be affirmed.

Opinion by *Gilbert, J.*; *Mullin, P. J.*, and *Smith, J.*, concurring.

PARTNERSHIP. PROMISSORY NOTE.

N. Y. SUPREME COURT—GEN'L TERM.
FOURTH DEPARTMENT.

White's Bank of Buffalo v. Joseph Getz and another.

Decided January, 1876.

Where an agent acts in making or endorsing negotiable instruments within the scope of his general authority, the fact that he has abused or perverted it in the particular instance, constitutes no particular defense against a bona fide holder for value.

This is an appeal from a judgment on a verdict of a jury for plaintiff.

The action was on a promissory note made by J. Getz & Co., of which defendant, Jewett, was one of the partners. Getz & Co. were extensive manufacturers in Buffalo, and Jacob Getz, one of the firm had oversight of the business, and borrowed money and

signed the firm name to notes, &c., and endorsed the firm name.

On the trial evidence was given that this note in suit was endorsed outside of the firm business, and that S., to whom the note was delivered, knew of this want of authority.

Before the note was due S. delivered same to plaintiff, in part payment of a protested draft for \$800, drawn by him, S., and held by plaintiff, and which plaintiff delivered up to S.

There was no evidence tending to show that plaintiff, in any way, knew of this want of authority in the person who endorsed the firm name.

The court directed a verdict for the plaintiff.

Sherman S. Rogers, for resp't.

Thayer and Benedict, for applt.

Held, Mr. Jewett being a partner in the firm of Getz, Jewett & Co., is liable on the endorsement of the note in suit by his co-partner, Mr. Getz, in the partnership name, notwithstanding such indorsement was made without any actual authority to make it; for the reason that the plaintiff is a *bona fide* holder of the note for value, and without notice of such lack of authority. Each party has a general authority, by virtue of the partnership relation, to endorse notes in the partnership name. They are mutual agents of each other. Where an agent acts in making or endorsing negotiable instruments within the scope of his general authority, the fact that that he has abused or perverted it in the particular instance, constitutes no defence as against a *bona fide* holder for value. In such a case the apparent authority is the real authority. (*Weeks v. Fox*, 3 N. Y. Sup., Thomp. & Cook, 356-7, and cases cited.)

The evidence leaves no room for doubt that the plaintiff is a *bona fide*

holder of the note, according to the settled rule of law of this state. He received the note in suit from Shutterworth in payment of a draft for a large amount on which Shutterworth was liable as drawee, and actually gave up the draft to Shutterworth. This constituted a parting with value, and nothing appears in the case, which, in other respects, impeaches the plaintiff's right to recover. (*Pratt v. Coman*, 37 N. Y. 440, and cases cited.) The measure of recovery in such a case is the amount of the bill or note surrendered, and not its supposed value as affected by the solvency or insolvency of the parties liable on it. (*Young v. Lee*, 2 Ker. 551; S. C., 18 Barb., 187.) Such value is fixed by the agreement of the parties, which is evinced by the exchange of the new security for the old one.

The judgment must be affirmed.

Opinion by *Gilbert, J.*; *Miller P. J.*, and *Smith, J.*, concurring.

COMMON CARRIER. BAGGAGE. N. Y. SUPREME COURT, GENERAL TERM, FOURTH DEPT.

Sloman, resp't., v. *Great Western R. R. Co.*, applt.

Decided January, 1876.

Railroad companies are not liable for the loss of merchandize delivered to them as baggage for transportation with a passenger.

To make the company liable the passenger must in some way bring to the knowledge of the company the fact that the property checked is merchandize, not baggage.

The plaintiff was a wholesale clothing merchant in the city of Rochester, his son was traveling for him and selling his goods. On August 8, 1873, the son was at Flint, Michigan, had with him, containing his samples, two large

trunks weighing about 300 pounds apiece. On the afternoon of that day he left Flint to go to Rochester. He went to the baggage master of defendant's road and had his trunks checked, paid extra baggage rates thereon, and took a receipt therefor. When the trunks were checked the son was asked where he wanted them checked to. He replied that he did not know at that time as he had sent a dispatch to a customer at Fultonville to know if he wanted any goods and if he did not, he would go to Rochester, as he expected to meet some customers on the train. Just before the train started he had the trunks checked to Rochester.

The goods were damaged on the trip and this action was for damages.

There was a judgment for plaintiff.

W. F. Cogswell for resp't.

Sprague, Gorham & Bacon for applt.

Held That railroad companies are not liable for the loss of merchandize delivered to them under the description of baggage, for transportation along with a passenger. If a railroad company knowingly undertakes to transport merchandize in trunks or boxes, which have been received by them for transportation in passenger trains, they are liable unless the agent, who received the package for that purpose, violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulation.

That to render a company liable for the loss of merchandize transported as baggage, the company or its agents must know, or must have been informed in some way by the passenger when the baggage was received, that it was not ordinary baggage but was merchandize.

That there was no evidence in this case warranting the inference that the

baggage-master knew, or was informed, that the trunks contained merchandize. The receipt given for extra baggage did not show it in any way.

Judgment reversed.

Opinion by *Gilbert, J.*; *Mullin, P. J.*, and *Smith, J.*, concurring.

INJUNCTION. CONTRACT. CONSTRUCTION.

N. Y. COURT OF APPEALS.

Clark, resp't., v. *The N. Y. L. Ins. and Trust Co. et al.*, *appls.*

Decided January 25, 1876.

An injunction will not be granted unless a reasonably clear case is made out.

A construction given to a contract claimed to restrict the right to build to the street line.

This was an action to restrain the erection of a building upon a strip of land $7\frac{1}{2}$ feet wide, on 22d street, in the City of New York, and extending east from Broadway 122 feet. It appeared that on May 12, 1849, an agreement was entered into between one K. & M. and wife, for the purpose of reserving $7\frac{1}{2}$ feet in front of the houses on each side of 22d street, from being built upon. The agreement recited that the parties were respectively the owners of divers lots on either side of 22d street between Fourth Avenue and Broadway, that divers dwelling houses had been erected on each side of said street leaving a court yard $7\frac{1}{2}$ feet in front of them, "and the parties hereto deeming it to be for their natural advantage that the lots fronting said street when built up between Fourth Avenue and Broadway, should be occupied exclusively for dwelling houses, and that the fronts of all such dwelling houses should be placed back seven feet and a half from

the line of the street, * * * do for themselves and their respective heirs and assigns, grant and agree to, and with each other, that so much of their respective lots belonging to them respectively, as is contained between the line of the street and a line seven and a half feet therefrom shall forever hereafter remain and be enjoyed as a court yard in front of any houses to be erected on said lots, &c." It was proved that when the agreement was made, the land had been divided into lots, and that the parties had before them a map which had been filed seven years in the Register's office, and according to which, lots on Broadway and Fourth Avenue, were laid out twenty-five feet wide and running back about ninety-six feet; between these, the lots were laid out twenty-five feet on Twenty-second street, and running back half the width of the block ninety-six feet.

W. A. Beach, for resp't.

Lyman Tremain, for appl'ts.

Held, That the lots laid out twenty-five feet on Broadway and Fourth Avenue, must be regarded as fronting on those streets, and the lots between must be deemed to front on Twenty-second street; and it must be presumed that the parties to the agreement so regarded them, and that when they specified lots fronting on Twenty-second street they intended to distinguish between those and other lots fronting on other streets. It must be assumed that the parties in making the agreement, had in contemplation the lots as laid out and designated on the map, and it might be inferred that they assumed that the lots on Broadway and Fourth Avenue, would or might be occupied for business purposes.

Also held, That the injunction sought would seriously interfere with

the right of property in the lots on Broadway, and something more than a doubtful right is required to justify an interference. A reasonably clear case should be made before the rights of an owner of property should be impaired to the extent claimed.

Judgment of General Term reversing that part of judgment of Special Term, which denied the relief demanded as to the lots on Broadway, reversed.

Opinion by *Church, Ch. J.*

GOOD WILL. SALE OF.

N. Y. COURT OF APPEALS.

Sander, et al., *appl'ts.*, v. Homan, et al., *respts.*

Decided February 22, 1876.

Upon the sale of a business and its good will, accompanied by an agreement not to carry on a similar business within certain limits, the vendor is bound not only not to solicit but to decline all business from customers within the prescribed limits.

This action was brought to recover a sum specified as liquidated damages for the breach of a contract, under which defendants sold the good-will of their business as retail dealers in meat and vegetables in New York city to plaintiffs, and covenanted with them not to engage in a similar business for five years within certain limits. A year after, defendants engaged in a similar business a short distance outside of the prescribed limits, and supplied some of their old customers within said limits by sending daily to their residences a wagon with the provisions they needed and receiving orders, through their messenger who carried them, for the day following. Only four such instances were shown upon the trial. There was evidence on the part of

plaintiffs that the custom of some of these persons had been solicited by the defendants. The latter denied this, and claimed that the customers proposed, without solicitation, to deal with them on being informed that they had resumed business. The judge charged the jury that if they found that defendants themselves or by their agents went into the prescribed limits, and there solicited or procured orders and filled such orders, it was a breach of the covenant; but if the orders were given them without solicitation on the part of defendants (and whether they were given within such limits was immaterial), the filling of such orders was not a breach of the contract. Plaintiffs duly excepted to the last proposition. The jury, having retired, returned and asked this question: "Is the sending an agent every day to the houses within the limited district to take orders and filling them, a competitive business or soliciting the same?" to which the court replied, "In the construction I have given to the contract, it would not be. The orders must have originally been procured by the solicitation of the defendants. If they proceeded from the customers, and not by the procurement of the defendants, it was not a breach to fill them." This ruling was duly excepted to by the plaintiffs.

Chas. H. Smith for appls.

Jno. L. Hill for respts.

Held, That these rulings were erroneous; that the covenant of defendants bound them to do more than refrain from soliciting patronage; it bound them not to carry on the business within the prescribed district, and if applied to for that purpose, it was their duty to decline. 4 Wend., 468; *Turner v. Evans*, 2 El. and Bl., 512, distinguished.

Judgment of general term, affirming judgment for defendants, reversed, and a new trial granted.

Opinion by *Rapallo, J.*

CONSTITUTIONAL LAW. TOWN BONDS.

U. S. SUPREME COURT.

The Town of Moultrie, plaintiff in error, *v.* The Rockingham Ten Cents Savings Bank.

Decided April, 1876.

The authorized body of a municipal corporation may bind it by an ordinance or resolution, which, in favor of private persons interested therein, may, if so intended, operate as a contract.

The obligation of a contract can no more be impaired by a constitution than by ordinary legislation.

In a suit upon negotiable town bonds, the town is bound by the recitals in the bonds, and in its official records.

In error to the Circuit Court of the United States for the Southern District of Illinois.

The bonds in suit were issued under authority given to the county by the act of March 26th, 1869, incorporating the railroad company. The tenth section of the act was as follows:

"The board of Supervisors of Moultrie County are hereby authorized to subscribe to the capital stock of said company, to an amount not exceeding eighty thousand dollars, and to issue the bonds therefor, bearing interest at a rate not exceeding ten per cent. per annum, said bonds to be issued in such denominations, and to mature at such times as the board of supervisors may determine, provided that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid."

No approving popular vote was required.

This section gave to the county complete authority to make a subscription to the capital stock of the company. The power was fettered by no conditions or limitations, except as to the amount which might be subscribed, but payment of the subscription was directed to be postponed until the railroad should be opened. The power thus granted was never revoked, unless it was by the new constitution of the state, which did not take effect prior to July 2, 1869, and which annulled the power of municipalities to make donations in aid of railroad companies. On the 16th of December, 1869, the board of Supervisors met and informally resolved to subscribe \$80,000 to the capital stock of the railroad company, and the resolutions were referred to a lawyer to be put in form before being recorded on the records of the board. They were accordingly prepared from minutes furnished by the chairman of the board, and entered by the clerk upon the records, as of the date of the December meeting of the board, and duly attested. This must have been done prior to the first Tuesday in March, 1870. The record, as it appears under date of December 16, 1869, is as follows:

"And it is further ordered by the board of supervisors of Moultrie county that, under and by virtue of the authority conferred upon said board by an act approved March 26th, A.D. 1869, entitled 'An act to incorporate the Decatur, Sullivan & Mattoon Railroad Company,' the county of Moultrie subscribed to the capital stock of the Decatur, Sullivan & Mattoon Railroad Company the sum of eighty thousand dollars to aid in the construction of a railroad by said

company, in pursuance of their charter.

"And be it further ordered by the board of supervisors aforesaid that, when said railroad shall be open for traffic' between the city of Decatur and the town of Sullivan aforesaid, there shall be issued eighty thousand dollars of the bonds of said county, in denominations of not less than five hundred dollars, payable to said company, drawing interest, to be paid annually, at the rate of eight per cent. per annum; the principal to be due and payable ten years after date, or sooner, at the option of the county; and that said bonds be delivered to said railroad company in full payment of the subscription of said county so made as aforesaid."

There was no further order of this board to enter the resolutions of record, but it was the clerk's duty to make the entry. The substance of them had been adopted. They remain of record still, and the board has never taken any action to correct the record. At the December meeting of 1872 a special committee was appointed to examine the records of subscriptions of railroad donations, and report. The committee did report on the 25th day of December, 1872, that the subscription of \$80,000.00 under the act of the general assembly of March 26, 1869, to aid in the construction of the Decatur, Sullivan, and Mattoon Railroad, was in accordance with law. Under this action of the board, and the report of the committee, the bonds were delivered.

The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity, and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that

they are issued by the county of Moultrie, "in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A. D. 1869, in conformity to the provisions of an act of the General Assembly of the State of Illinois, approved March 26, A. D. 1869."

Held, 1. A subscription on the books of the company was unnecessary; that the act of the board of supervisors in 1869, amounted to a subscription; the resolution of that date operated as an immediate subscription.

2. But whether it amounted to a subscription or not is of no moment. It was at least an agreement to subscribe, and having been accepted by the company, created a valid contract, which could no more be annulled or impaired by the prohibitions of the constitution than by legislative enactment.

3. That the defendant could not set up in defense against a *bona fide* holder, in the face of the recitals of the bonds and the county records, that the authority to make subscriptions had expired before the subscription was actually made. Whether it had expired was a matter of fact, not law, and peculiarly within the knowledge of the supervisors.

Judgment affirmed.

Opinion by *Strong, J.*

PRACTICE. EVIDENCE.

N. Y. SUPREME COURT—GEN'L TERM.,
FIRST DEP'T.

Alexander J. Howell, *respt.* v. Henry K. Van Sicklen, Executors, *et al.*, &c., *appls.*

Decided December 2nd, 1875.

It is an error under the 399th § of the code, to allow plaintiff as a witness in the case, to show that the testator had not paid a promissory note in his life time.

And in a case where the question is permitted under objection and exception, the Court will reverse the judgment, although the plaintiff might have safely rested his case without the evidence.

A party has a right before offering any evidence of his defence to stand upon his objection and exception to illegal evidence, for the purpose of having same stricken from the case.

Action upon a promissory note made by the defendant's testator, payable to plaintiff or order. Answer sets up defence of payment.

On the trial the plaintiff produced the note, and proved that the signature was in the testator's handwriting, the note was read in evidence. The plaintiff was called as a witness on his own behalf, and was asked the question: Are you the owner and holder of this note? The defendant objected to the question on two grounds;

First, "That it is a question of law and calls for the decision of a question of law;" and second, "That the paper in its form, shows a transaction between witness and deceased." These objections were overruled and defendant excepted. The plaintiff answered, "I am." He was then asked the following question. "Has it ever been paid?" To this question the same objections were made. The referee overruled the objections, and defendant excepted. The plaintiff answered, "No."

The plaintiff rested; and no evidence on the questions of payment or the ownership of the notes was given on the part of the defendant, and the referee rendered judgment for the plaintiff for the amount of the note. The

only question in the case is, whether it was a fatal error to allow the plaintiff to answer the questions above stated.

E. J. Spink, for resp't.

George W. Van Sicklen, for appl't.

Held, That it was an error to allow plaintiff, by his own statement as a witness in the case, to show that the testator had not paid the note in his lifetime. The evidence was not proper, under § 399 of the code. *Dyer v. Dyer*, 48 Barb. 190; *Clark v. Smith*, 45 Id. 30; 55 Barb. 337; 3 Lansing, 68.

It is no answer to this illegal evidence to urge that the plaintiff's case was proved without it, and that defendant offered no evidence of payment. It cannot be held that they had no such evidence to offer, although that may be the fact.

For they had a right to stand upon their exception, as long as it was well taken, for the purpose of having this illegal evidence excluded from the case, before they undertook to establish their defence. They were entitled to be relieved from the effect of that evidence before they finally tried the fact of payment, in order that their own proof might not be impaired by its presence in the case. The referee properly overruled the other objections to the evidence. But on account of the erroneous admission under objection of the above mentioned evidence by plaintiff, to disprove payment by defendant's testator, the judgment must be reversed and a new trial ordered, costs to abide event.

Opinion by *Daniels, J. and Brady, J.* concurring. *Davis, P. J.* dissents.

PROMISSORY NOTE. DEFENSE.
PHILADELPHIA COMMON PLEAS, No. 1.

Bank v. Berger.

Decided March 18, 1876.

In a suit against the maker of a promissory note, it is not sufficient to allege that plaintiff had "settled with" the payee, without alleging payment.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note by holder against maker.

The affidavit of defence set forth that the note was given to the firm of S. Isard & Co., as accommodation paper, entirely without consideration, and that plaintiffs derived their title to it through them; that said Isard & Co. had settled all their affairs with the plaintiffs, and that defendant believed this suit to be brought entirely in the interest of the said Isard & Co. to enable them to recover on the note for which they have given no consideration.

Held, The affidavit does not allege payment to plaintiffs; it avers a settlement which is not an averment of payment.

Rule absolute.

PRACTICE. FRAUD.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Jacob P. Marshall, appl't., v. Joseph S. Fowler et al., respts.

Decided March 29, 1876.

In an action for damages for fraud committed by means of representations, falsely stating the state of defendant's knowledge, it should be so alleged specifically in the complaint to raise such an issue on the trial.

Where the grounds of the action are false statements made by defendant, with intent to deceive, it is necessary that it should appear by affirmative proof, that the defendants knew the representations to be false.

Fraud will not be presumed or conjectured.

Appeal from judgment recovered on dismissal of the plaintiff's complaint at the circuit.

The plaintiff brought this action to recover damages for fraud in the sale made of twenty-four hundred and ten barrels of apples, in December, 1869.

By the complaint, the fraud was alleged to consist in the representation that they were a first rate and choice lot of Niagara County winter apples; and that such representation was false and fraudulent, known to the defendants to be untrue, and made with intent to deceive and defraud the plaintiff. The defendant, upon these allegations, joined issue.

For the purpose of establishing the cause of action, the plaintiff himself, and Murphy, his foreman, one of the witnesses examined on his behalf, both testified that the defendant stated that the apples were a choice lot of Niagara County winter apples, that they were well put up, and a choice lot of apples. Evidence was then given which tended to show that the apples appeared well and of good quality under the heads of the barrels, but those in the intermediate space were unfit for ordinary purposes and mostly of the quality called cullings, used for making cider, and the difference between their value and that of choice Niagara County winter apples was shown. That made out the case as it was presented by the plaintiff's evidence.

At the appeal it was elaborately argued that a fraud was committed by means of representations, falsely stating the state of defendant's knowledge concerning the condition and quality of the apples.

Wm. W. Niles, for applt.

A. Hamilton Webster, for resp't.

Held, That the point urged that a

fraud was committed by means of representations falsely stating the state of the defendant's knowledge, etc., was not in the case. For the purpose of making it a ground of action, it should have been alleged, if the facts were considered such as to justify the statement that without knowing the condition and quality of the apples the defendants represented that they possessed that knowledge, and knew them to be in the condition represented, and the representations were made to deceive and defraud the plaintiff. That was required to enable the defendants to understand the charge made against them, in order that they might have a proper opportunity to prepare to meet it at the trial. And the provision of the code declaring that the complaint shall contain a statement of the facts constituting the cause of action can be complied with in no other way. The case was tried upon the issue whether the defendants' knowing that the representation was untrue, represented the apples to be a first rate and choice lot of Niagara County winter apples. By neither one of the requests, nor by all of them combined together, was it claimed that any representation of the state of defendant's knowledge was made to the plaintiff, or that any such statement was shown to have been untrue.

Held, That for the purpose of maintaining the cause of action, it was necessary to show not only that a material misrepresentation had been made concerning the apples, but also that it should have been shown that it was known to be false by the person making it. The rule upon the subject is now very well settled. *Marsh v. Falkner*, 40 N. Y., 562, 565; 50 N. Y., 480.

There was clearly nothing in it from which it could be reasonably inferred

that the defendant knew, or had any reason to suppose that the apples were in any respect different from the representations which the plaintiff stated had been made concerning same. In that respect the proof was wholly deficient. It is claimed that this defect is supplied by defendants' proof; we think on a review of the evidence it is not. Fraud is not to be conjectured, but must be proven by satisfactory evidence by which its existence can reasonably be concluded.

Judgment appealed from affirmed.

Opinion by *Daniels, J.*; *Brady, J.*, concurring.

LIFE INSURANCE. BURDEN OF PROOF. CONTRACT FOR.

U. S. SUPREME COURT.

The Piedmont and Arlington Life Insurance Company, Plaintiff in Error, v. Ashley W. Ewing, administrator of the estate of John F. Howes, deceased.

Decided April, 1876.

In an action upon a life insurance policy, where the defense is that the assured made false answers to questions in his application, the defendant must prove their falsity; it is not for the plaintiff to prove his answers true.

Where the administrator of the deceased had received the policy but it was not in reality delivered by the agent until after the death of the assured, and in ignorance of that event, no recovery can be had unless a valid contract of insurance existed between the insurer and insured, before the latter's death, and the policy delivered in pursuance thereof.

In error to the Circuit Court of the United States for the Western District of Missouri.

This was an action on a policy of life insurance issued by plaintiff in error.

The defense is, that though plaintiff

below, as administrator of Mr. Howes, whose life it purported to insure, had received the policy, it was in reality not delivered until after the death of the assured, and in ignorance of that event. This is not disputed, but plaintiff below insisted that a contract of insurance had been made between Howes and the insurance company, before his death, which bound the company; and whether this was so or not is the principal question in the case.

Another defense, however, was that the assured, having in his application, in answer to the questions propounded to him, stated, among other things, that his habits of life were correct and temperate, and had ever been so, and that he had never habitually used ardent spirits to the extent of intemperance; and in reply to the question, "Are you subject to, or have you had, dyspepsia, diarrhea, dysentery, disease of the heart, stomach, bowels, or any of the vital organs?" answered "no." The defendant alleges in his answer to the declaration that these answers were untrue.

On this branch of the case the plaintiff in error claimed that the burden of proving the truth of these answers was on plaintiff below, and that if he failed to introduce satisfactory evidence on that subject he could not recover; but the court below ruled that defendant must prove their falsity.

The number of questions in this application which require an answer are from thirty to fifty in every case.

The court submitted to the jury the question whether, notwithstanding the policy was delivered to a friend of the deceased after his death by the agent of the company, in ignorance of the fact of his death, there had been a contract for insurance before his death, which made this delivery a duty, and,

therefore, valid. And in doing this, the court placed before the jury hypothetically the principal facts proven on that subject, and said if they found them as thus stated to be true, they were sufficient to justify a verdict for the plaintiff. This charge is the main error relied on to reverse the judgment.

It appears that Howes was publisher of a newspaper, and that the special agent of the company, Huff, desiring to advertise in the paper, an agreement was made that Howes should take a policy on his life for \$5,000, and the cost of a year's advertisement should go towards paying the first annual premium. The advertisement was to cost \$70, and its publication in the paper commenced at once. This was about the 28th of August, 1871. Howes made his formal application, and the company sent its local agent, Bell, with instructions to deliver the policy on the payment of the balance of the first annual premium, to wit, \$17.70, the whole premium being \$87.70.

"It appeared in evidence," says the bill of exceptions, "that said policy was executed by the officers of the company and forwarded to said Bell, and received by him at Jefferson City, Missouri, about the 6th day of September, 1861, to be countersigned and delivered; that he tendered the same to said Howes and demanded the cash part of said advance premium to wit, \$17.70, but that said Howes did not pay the same, saying that the printing was to pay the first semi-annual premium on the policy; that he would write to Huff, the special agent of the company, with whom he had made the contract at Kansas City, about it; that after giving said Howes time to hear from said special agent, said Bell called again upon said Howes for the \$17.70, but he did

not pay the said sum, and that afterwards, to wit, on the 12th day of October, 1871, said Bell, being about to remove to the neighborhood of Brazeto, fifteen miles from Jefferson City, called again upon said Howes, and found him sick. Howes told him that he would look up the accounts as soon as he was able to get to his office, and would settle the matter."

This evidence seems to be uncontradicted. On the 14th day of October, on or about six o'clock in the evening, Howes died, and Bell was not in the city. But on that day, Howe's friend and partner, Ragan, (at what hour is not stated,) paid to a man using the same office with Bell, the \$17.70, and gave a receipt for the bill for printing of \$70, and took from the same person a receipt in full for the \$87.70 paid on the policy, describing it by number. This receipt was signed R. A. Hufford, for J. F. Bell, agent, &c.

Neither Hufford nor Bell knew of Howe's condition at this time. Hufford wrote to Bell what he had done, and requested him to send the policy by mail, which he did. There is some question raised as to Hufford's power to accept and receipt for the money, and if he had none, then as to Bell's ratification of his act.

Held, 1. That the burden of proving the answers to the questions to be false was upon the defendant.

2. There is no evidence to show that Howes and Huff, the first agent, ever came to any terms as to the amount of the premium, and but little to show that they agreed on the price of the advertisement. It is quite plain that when the policy was presented to Howes and the balance of \$17.70 demanded, that the parties had not then come to an understanding of the pre-

cise terms of the contract. It amounted to no more than this : that the company should advertise in Howes' paper ; that he should take a policy of the company for \$5,000, and that the advertisement should go as payment on the first premium.

But Mr. Howes insisted that the advertisement should pay the first premium in full, and he refused to accept the policy on any other terms.

This case differs very widely from those in which a delay in payment has been treated by the court as waived. All such cases proceed on the ground that a valid agreement to the terms of the contract has been made.

Notwithstanding the cautious manner in which the judge recited his view of what had been given in evidence, and left the jury to believe it or not, we think there was no such evidence of the existence of a valid contract as to sustain the verdict.

The judgment of the circuit court is reversed, and the case remanded with directions to set aside the verdict and grant a new trial.

Opinion by *Miller, J.*

TRUST INCOME. NOT LIABLE TO LEGAL PROCESS.

SUPREME COURT OF PENNSYLVANIA.

Bachman v. Wolbert, *deft*, and Wilcox, *garnishee*.

Decided March 6, 1876.

Where a testatrix left property in trust to pay the income thereof to her son for life, directing "the same shall not in any way be liable for any past or future indebtedness of my said son," the income in the trustees' hands cannot be reached by an attachment execution.

Error to the District Court of Philadelphia County.

Attachment execution issued by Bachman on a judgment execution against Wolbert, defendant, and Wilcox, garnishee.

It was agreed that the following case stated should be submitted to the Court, with the right reserved to each party to bring a writ of error to the judgment entered thereon. "On July 26, 1872, the will of Eliza Wolbert was admitted to probate, and letters testamentary granted to the garnishee. In this will is the following bequest :

"I give and bequeath and devise all my property and estate of any kind, real and personal, and mixed, which I received from my father, to my executors absolutely and in fee simple, in trust, to pay the income thereof to my son John A. Wolbert, for and during the term of his natural life, and that the same shall not in any way be liable for any past or future indebtedness of my said son ; and upon his death, in further trust, to transfer and convey the said property and estate to his children then living, absolutely and in fee simple, in equal shares as tenants in common, so, however, that the issue of any deceased child shall take among them only such part or share as their deceased parent would have taken if living, and should my said son John die without leaving at his death any child, or issue of any deceased child of his, then to my nieces Fanny Boyer and Mary Boyer, in equal shares as tenants in common during their respective lives, so long as they shall respectively remain unmarried, and upon the death or marriage of either of them, her share to such person or persons as would be entitled thereto under the intestate laws of this commonwealth, had I died intestate."

"The plaintiff issued an attachment

in execution on August 5, 1871, on a judgment for \$3993.38, which attachment was served upon the said garnishee simultaneously with another attachment in execution, issued upon a judgment for \$1425.06, in which John Bachman was plaintiff. John A. Wolbert was the defendant in each of the said writs. Up to March 4, 1873, the garnishee had received as income on said bequest the sum of \$445.14 payable under the provisions of said will to John A. Wolbert. If the Court be of opinion that the said writs of attachment bound the income of said trust estate, in the hands of the garnishee, then judgment for the plaintiff for \$328.06, otherwise judgment for the garnishee."

Judgment was entered for the garnishee, to which the plaintiff took this writ of error.

Held, This is a clear case of an active trust, to preserve the income of John A. Wolbert from the process of his creditors.

Judgment affirmed.

Per curiam opinion.

PRACTICE. BILL OF REVIEW. APPEAL.

U. S. SUPREME COURT.

Harvey Terry *applt.*, v. The Commercial Bank of Alabama, *respt.*

Decided April, 1876.

This court, upon an appeal from a decree, cannot review a master's report upon exceptions filed after the decree, nor set aside a decree because it was obtained by fraud. In such case the remedy is by bill of review.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

The defendant, The Commercial Bank of Alabama, was a banking cor-

poration organized under the laws of that state, and had become insolvent. The appellant, a citizen of the State of South Carolina, brought a suit in the District Court for the Middle District of Alabama, at that time exercising circuit court powers, to wind up the bank under the provisions of the 21st section of its charter. Plaintiff alleged and proved that he was the owner of about \$3,000 of the notes of the bank, on which he had demanded payment and been refused. The bank admitted its insolvency, and a receiver was appointed by consent to wind up its affairs, and publication made for all creditors to come in and prove their claims. The receiver made his report, which was referred to a master, who also reported.

These reports, and several supplemental reports, were all confirmed without exceptions, and a final order of distribution made among those who had proved their claims, allowing first the costs of the proceeding, including attorney's fees and other costs of suit. All of these were referred to a master, who reported, and to whose report no exceptions were taken.

After all this was done, the appellant here and the plaintiff below appeared in person and filed numerous petitions and affidavits signed by himself, asking to set aside the decree, excepting to the decree, excepting to the reports, and suggesting many other matters and things in which he sought to modify or correct the decree.

The foundation of all this seems to be the charge that his counsel deserted his interest, failed to except to the reports, and consented to the decree because they received what he called an exorbitant allowance for their services out of the fund which should have gone

to the creditors of the bank, thereby diminishing the amount of his dividend.

Held, If the appellant desired to place the case in a position where this court could review the action of the court on the class of questions raised by his petitions, affidavits and exceptions, he should have filed his bill of review, made the proper issues, and supported it by depositions. This court cannot review upon appeal such matters, nor set aside a decree because it was obtained by fraud.

Decree affirmed.

Opinion by *Miller, J.*

CONSTRUCTION OF STATUTE. MANDAMUS.

N. Y. SUPREME COURT—GEN'L TERM.

FOURTH DEPT.

The People ex rel Conway, *applt.*, v. The Board of Supervisors of Livingston county, *respt.*

Decided January, 1876.

In a statute directing the Board of Supervisors to audit an account not a legal charge on the county, the word "may" is not to be construed "shall."

It might be so construed in an act to enforce a right already existing.

Plaintiff's husband constructed a bridge over the Genesee river, between the towns of Genesee and Leicester, in Livingston county. His account was \$5,000.

The county refused to pay the same, and so did the towns. There was some informality with the contracts, and it was claimed that the work was not properly done.

In December, 1866, the Board of Supervisors ordered such sum to be assessed on the towns of Leceister and Genesee. But the Board failed to extend the tax.

In 1872 the Legislature passed a law in and by which it was provided in the first section "that defendants are authorized to audit and adjust the claim," and in the second section it is provided "that they may cause to be levied and collected upon the towns of G. and L. such sums as shall be found necessary to pay the assessments allowed."

The Board at their next annual session, did by resolution audit the account of Mrs. C., but again failed to levy the tax on the towns, &c.

This resolution of the Board also requires that Mrs. C. perform certain acts on her part, as executing bond, &c.

The *applt.* procured a mandamus directed to said Board, compelling them to cause to be levied, collected and paid over to the relator, Sarah Conway, the sum of \$5,000 and interest, or show cause to the contrary.

The *applt.* demurred to the return of the mandamus, and such demurrer was overruled, and from the order overruling, *applt.* appeals.

The return states that Mrs. C. has not complied with the resolution of the Board, and that the work on the bridge was not well done.

J. C. Cochran for *applt.*

S. Hubbard for *respt.*

Held, That the object of the act of 1872 was to give the Board of Supervisors a discretionary power, and not to impose upon them a positive duty.

That the act of 1872 was permissive, and not mandatory. Such statutes are never construed as imposing a duty to exercise the power conferred by them unless the public interest requires it, or a party before the court is entitled by virtue of an antecedent right to have the power exercised for his own benefit. The word "may" will not be construed "shall" in order to create a right, but

will be so construed in order to enforce a right. *People ex rel Otsego Bank v. Board of Supervisors*, 51 N. Y., 401.

That because the Board audited the claim plaintiff was not from that fact entitled to have the tax levied and collected, for the authority conferred by the act is entire, and the exercise of one part does not of itself confer a right to demand the exercise of the other part.

That the fact that the Supervisors adopted a report of a committee recommending that the Board award a sum therein stated to the claimant, on certain conditions, was not a final and conclusive audit of the same, and the plaintiff has not complied with the conditions.

The demurrer admits the truth of the facts stated in the return.

The judgment on the demurrer affirmed, with costs.

Opinion by *Gilbert, J.; Mullin, P. J. and Smith, J.*, concurring.

PLEADINGS. MISJOINDER. CAUSES OF ACTION.

N. Y. COURT OF APPEALS.

Wiles, et al., respts. v. Suydam, applt.
Decided February 8, 1876.

In an action against a stockholder to recover the amount of a judgment against an insolvent corporation, on ground of failure to pay in his stock, and because no certificate of the payment of capital stock had been filed; a cause of action, seeking to recover against defendant as a trustee of the corporation, for neglect to make and publish the report required by law, cannot be joined.

The fact that the allegations as to both grounds were mingled in one count, does not deprive defendant of the right to demur.

This action was brought to recover the amount of a judgment against a manufacturing corporation, organized

under chapter 40, laws of 1848, which had become insolvent, from the defendant a stockholder and trustee thereof. The complaint charged and sought to recover on two grounds, 1st. that defendant had not paid his stock and that no certificate had been filed to the paying in of the capital stock of the company. 2nd, that he was liable as trustee, by reason of the failure to make and publish the report required by law. Defendant demurred on the ground of an improper joinder of causes of action. The demurrer was overruled.

Geo. W. Weiant. for respts.

A. H. Hitchcock. for appls.

Held, Error; that the nature of the two actions is essentially different, although the object to be attained is the same, the one being on contract, and the other on a statute for a penalty or forfeiture, that there is no such connection between the transactions out of which the causes of action arose, and the "subject of action," as to justify uniting them in the same action.

The complaint contained but one count, composed of series of allegations.

Held, That the omission to state the causes of action in separate counts, properly numbered, did not deprive defendant of the right to demur.

Judgment of General Term, affirming judgment, overruling demurrer, reversed.

Opinion by *Church, Ch. J.*

SAILING RIGHT. SALE OF PHILADELPHIA COMMON PLEAS, No. 2.

Williams v. Ireland.

Decided April 8th, 1876.

The rule that the sale of an interest in a vessel by a part owner, who is also a master, carries no right to the command, is founded on the policy of

the law, and a contract to sell the command, even by the owners of a majority interest, is incapable of enforcement.

Any contract that fetters the judgment of the owners, or binds them to the selection of a particular person, is in violation of the rights of the other parties, whose property or lives are involved in the voyage, and therefore void.

Where a master, who is also part owner, sells his share and transfers the command to his vendee, the latter takes only an expectancy that he will be allowed by the owners to retain the command, and whatever he pays for this expectancy is a profit to the former master for his relinquishment of the command, and not any part of the ship's earnings, in which the other owners are entitled to share.

This was an action of assumpsit, and the declaration contained the common counts only. The bill of particulars claimed the sum of \$468, "being the 5-16ths of the amount received by the defendant while acting as managing owner of the schooner Archer & Reeves (of which plaintiffs were the owners of 5-16th parts) in consideration of installing one B. C. Smith as master of said schooner, and permitting and selling to the said Smith the right to sail and manage said schooner, and to receive and keep for his own use and profit the one-half of the net earnings of said schooner."

At the trial it was proved that defendant, being the owner of one-eighth of the schooner, and being at the same time master and managing owner, sold to Captain Smith his (defendant's) one-eighth share and certain personal property on board the schooner, and also transferred to him the position of master, receiving from Smith the sum of \$4,500. Before the transfer defendant obtained the written consent of the

owners of more than half the vessel that Captain Smith should have the command of her on half shares—the same terms on which she had been sailed by defendant, in which consent, however, plaintiffs did not join.

The foregoing facts were agreed upon by both parties, and also that plaintiffs at the time of the sale were owners of one-fourth of the vessel—proof as to the other one-sixteenth named in the bill of particulars having failed, and that much being abandoned by plaintiffs' counsel. The only contested facts in the case were how much of the \$4,500 paid by Smith was for the personal property, and whether the rest of the purchase money was more than the value of the share of the vessel, and was paid to the defendant partly as compensation for his transferring to Smith the command of the schooner with the consent of a majority of the owners. Upon these questions the case went to the jury with instructions to find a verdict for plaintiffs for one-fourth of whatever they should find, if anything, was paid as compensation for such transfer of the command; and the question was reserved whether plaintiffs as part owners were entitled by law to recover any share of such compensation. The jury found that part of the money paid by Smith was for the transfer of the command to him by the defendant, and their verdict was accordingly for plaintiffs for \$371.05; and the question is, whether under the facts thus agreed upon or found by the jury, the plaintiffs are entitled to recover.

Held, There is no such thing in general as a sailing right which binds the owners of a vessel; that the sale of the command is only an expectancy that the owners will permit the purchaser to continue, and therefore he acquires no

right which can be the subject of a consideration paid.

The rule that the sale of an interest in a vessel by a part owner, who is also master, carries no right to the command, is founded on the policy of the law, and a contract to sell the command, even by the owners of a majority interest, is incapable of enforcement. The reason is, that it is the right and for the interest of all parties concerned, the owners, the charterers, the crew and the passengers, that the master should be selected solely for his fitness, and should be removable at any time. Any contract that fetters the judgment of the owners, or binds them to the selection of a particular person, is in violation of the rights of the other parties, whose property or lives are involved in the voyage, and therefore void.

This rule is well established, and one of its results is, that where a master, who is also part owner, sells his share and transfers the command to his vendee, the latter takes only an expectancy that he will be allowed by the owners to retain the command, and whatever he pays for this expectancy is a profit to the former master for his relinquishment of the command, and not any part of the ship's earnings, in which the other owners are entitled to share. The plaintiffs have no cause of action.

Judgment is therefore entered for the defendant on the point reserved.

Opinion by *Mitchell, J.*

SELLING ADULTERATED MILK. N. Y. SUPREME COURT, GENERAL TERM. FIRST DEPARTMENT.

Patrick Cox, *plff. in error*, v. The People of the State of New York, *defts. in error*.

Decided March 31, 1876.

The power to enact and enforce ordinances has always formed an essential feature in the creation of municipal corporations. The legislature may confer the power upon the Common Council, or any of the departments of the municipal government.

Certiorari to the Court of Special Sessions on the conviction of the relator of a misdemeanor.

Patrick Cox, was, on the 16th day of February, 1876, at Special Sessions, convicted of the misdemeanor of keeping and offering for sale at No. 119 Mulberry street, in the City of New York, watered and adulterated milk, in violation of certain sanitary ordinances of the Board of Health, and was sentenced to one month in the Penitentiary.

The plaintiff in error, alleges that there is not sufficient evidence to warrant a conviction, because it was not established on the trial, that he ever owned said grocery business, or ever sold or offered for sale any milk at said store, or at any other place. That the acts of the legislature empowering the Board of Health to enact sanitary ordinances is unconstitutional and that it did not appear by the return that the persons before whom the relator was tried, were the officials having the power to hold the court.

The ordinance of the Board of Health declares, "That no person shall have "at any place where milk and butter "or cheese is kept for sale, nor at any "place, offer or have for sale, nor shall "any person bring or send to said city, "any unwholesome, watered, or adulterated milk, or milk known as swill "milk, or milk from cows and other "animals, that for the most part lived "in stables, &c."

Section, 82, article eleven, of chap. 335, of the laws of 1873, authorizing the Board of Health to pass the ordinances

reads as follows: The Board should also be "authorized and empowered to "add to such sanitary code, from time "to time, and shall publish additional "provisions for the security of life and "health in the city of New York * * * "which shall be published in the *City Record*. Any violation of said code, "shall be treated and punished as a "misdemeanor, and the offender shall "also be liable to pay a penalty of fifty "dollars, to be recovered in a civil action "in the name, &c."

Wilson S. Wolf, for relator.

W. P. Prentice, for respts.

Held, The power to enact and enforce ordinances, has always formed an essential feature in the creation of municipal corporations, and the constitution contains nothing restricting its exercise to any particular part of the municipal body. It may be conferred upon the Common Council, or any other department of the municipal government, as the necessary result of the plenary authority secured by the constitution to the legislature.

That the legislature could confer it upon the corporation is very clearly settled by an unbroken weight of authority. 2 Daly, 307; 4 Meeson & W, 621, where it was held that corporate by-laws, enacted by authority, have the same effect within these appropriate limits as an act of parliament. Id. 640; 3 Allen.

The practice on the other hand has long existed by which the power has been conferred upon boards of health. And it has not been limited to the cases of large cities.

The power of the legislature over the subject has not been denied by the constitution, and the conclusion necessarily follows that it could, as it has, delegate to the Board of Health of the city of New York the power to make the ordi-

nance in question. It was merely the exercise of municipal authority, through the intervention of this Board instead of the Common Council.

The fact that the return is prefaced with the statement that the aforesaid persons who tried the relator, are the Police Justices and the Justices of the Court of Special Sessions, and besides the fact that the writ was issued to them as Police Justices and Justices of the Court of Special Sessions, is sufficient answer to the objection that it nowhere appeared that the officials before whom the relator was tried had power to hold the Court.

Opinion by *Davis, P. J.*; *Daniels* and *Brady, J. J.*, concurring.

LIFE INSURANCE. ACT OF GOD.

NEW YORK COURT OF APPEALS.

Evans, applt., v. The United States Life Insurance Company, *respts.*

Decided February 25th, 1876.

A life policy containing a clause making it void if the insured went south of certain limits without the consent of the company, is invalidated by the continued stay of the insured south of such limits, whither he went under consent of the company for a prescribed period.

And where the company's officers, after such forfeiture, declined to receive further premiums unless 2½ per cent. more was paid to cover the additional risk, and gave plaintiff's agent till next day to pay, agreeing to keep the policy in force and give credit for the premium and percentage, they have the right to abandon their agreement, and to refuse to receive the premium and percentage, and declare the policy forfeited.

That the insured was ill, and that it was highly inconvenient for him to return, affords no ground for relief, unless it appear that he was actually unable to travel, even by short stages and at great expense.

This action was brought upon a policy of life insurance, which contained a clause, that if the insured, without the written consent of the insurer, should, "between the 1st of July and the 1st of November, visit those parts of the United States which lie south of the southern boundaries of Virginia and Kentucky, this policy shall be void." In November, 1869, the insured went to Louisiana, and remained there until he died, March 18th, 1872. He had the written permit of defendant to go to New Orleans and remain until July 1, 1870. On Oct. 28, 1870, plaintiff's agent went to defendant's office and offered to pay the annual premium and tendered the amount to defendant's officers. They declined to receive it on account of the residence of the insured in the south, unless he would pay $2\frac{1}{2}$ per cent. more on the amount insured. The agent stated he could not do this without the authority of his principal and the officers agreed to continue the policy in force, and give credit for the premium due, including the extra amount claimed until the following day, in order to give the agent time to report to his principal and his principal time to comply. On the next day, plaintiff sent another agent to defendant's office, who then tendered the amount of the premium, together with the extra $2\frac{1}{2}$ per cent. claimed, and defendant refused to receive it claiming that the policy was void.

F. G. Salmon, for applt.

Edgar S. Van Winkle, for respts.

Held. That the violation of the provision of the policy by the continued residence in the south, of the insured, invalidated it, and that defendant was not bound by the proposition made by its officers to plaintiff's agent on Oct.

28th 1870, and had the right on the 29th to refuse to receive the money and decline the engagement it had offered to make, that even if this proposition had been binding on defendant for the year 1870, it had the right in October, 1871, to refuse to continue the policy any longer. It was claimed by the plaintiff that after the insured went south, he became so sick and feeble that he could not return, and that hence his return was rendered impossible by the act of God, and that therefore there was no breach of the policy. The evidence showed that the insured had met with an accident before going south, that his health was very poor in the summer of 1870, and he could only ride out to the plantation in which he was interested, in a buggy and ride back without getting out of it, and was never any better. There was no evidence that he was too unwell to return north, or that he made any effort to return; and his condition prior to July 1, 1870, was not described.

Held. That to bring the case within the supposed rule, there should have been proof, that for some time before July 1, 1870, the insured was unable to travel by any of the usual modes. He was bound to return if he could travel by short stages, or by incurring unusual expense to secure comfort, safety, and convenience. The insured took the chances of being able to return, and being feeble when he went, he could not go so far south that he could not return, and then claim that his action was rendered impossible by the act of God.

Order of General Term reversing judgment for plaintiff, and ordering new trial affirmed.

Opinion by *Earl, J.*

PROMISSORY NOTE. ENDORSEMENT.

N. Y. SUPREME COURT, GEN. TERM,
FIRST DEPARTMENT.

George M. Weld, et al., *respts.*, v.
Henry E. Bowns, *applt.*

Decided April, 1876.

An endorser will become liable upon his endorsement to the payee of the paper when he has made himself such for the purpose of securing credit for the makers.

The payee upon a note may show by parol evidence that the party endorsing commercial paper as its second endorser, had really bound himself and designed to become the first endorser.

Persons endorsing commercial paper should be held liable to those appearing to be prior parties upon it, when they are shown to have agreed to assume that relation, and the agreement was made upon a sufficient consideration.

Appeal from a judgment recovered upon a referee's report in favor of plaintiff.

The facts found by the referee are substantially as follows: That the plaintiffs were dealers in coal, and in November, 1869, had been applied to by George Woodward to sell him a cargo of coal. That they were unwilling to do so upon his own credit, and it was finally agreed between the defendant and the plaintiffs that they should sell Woodward the coal, and that the defendant would endorse and guarantee his note for the purchase price for twenty cents a ton. In compliance with that agreement, they sold and delivered the coal to Woodward, and received from him his promissory note for the purchase price, being the sum of \$693.50. The note was made payable to the order of Weld, Nagle & Co., which was the name of the firm

constituted by the plaintiffs. They then sent it to the defendant, who endorsed his name upon it, and returned it to the messenger, and he gave it to the plaintiffs. They credited the twenty per cent. to be allowed for the endorsement in the defendant's account, and he had the benefit of it in their settlement.

When the note came due it was protested for non-payment, and notice of its dishonor given to the defendant. The plaintiffs and payees had previously endorsed the note, and turned same over to their bank for discount, but same came back into their hands, and this suit was commenced.

Treadwell Cleveland for *respt.*

Wm. W. Mann for *applt.*

Held, That without the existence of the agreement made for the defendant's endorsement, he would stand as the second endorser on the note, and for that reason not liable to the plaintiffs, to whose order it was payable, and who by their endorsement of it became ostensibly its first endorsers. *Bacon v. Burnham*, 37 N. Y., 614. That an endorser of a note becomes liable upon his endorsement to the payee of the paper, when he has made himself such for the purpose of securing credit from him for the maker. It does not appear to be essential to the existence of the liability that it shall be assumed at the instance of the maker. The important elements on which it rests is the fact that by means of the agreement and the endorsement the payee has been induced to sell and deliver his property to the maker. When that benefit has been in that manner secured, the agreement will be founded upon a sufficient consideration to change the apparent relation of the parties to the paper, and

render the second liable as the first endorser upon it.

The authorities establish the right of the payee to show by parol evidence that the party endorsing commercial paper as the second endorser, had really bound himself and designed to become the first endorser. The later authorities in this state maintain the principle that persons endorsing commercial paper should be held liable to those appearing to be prior parties upon it, when they are shown to have agreed to assume that relation, and the agreement was made upon a sufficient consideration to render it obligatory. *Coulter v. Richmond*, 59 N. Y., 478; *Hubbard v. Matthews*, 54 N. Y., 43; *Phelps v. Vischer*, 50 N. Y., 69.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

ATTORNEY. APPEARANCE.

N. Y. SUPREME COURT—GENERAL TERM,
FIRST DEPARTMENT.

James H. Lyles, et al., v. John M. Hagy, et al.

Decided March 31, 1876.

One partner has no right, unless specifically authorized, to retain an attorney to appear in an action for his copartners in a suit brought against all the copartners.

Appeal from order made at Special Term, denying motion to cancel the appearance of the defendants, Hagy & Knowles.

This action was commenced by the service of a summons on the defendant Justice, in June, 1874, to recover damages for breach of a contract, alleged to have been made in April, 1874, by defendants, who, it appears, were copartners in this business.

No summons was ever served on the defendants, Hagy & Knowles, both of

whom reside in Philadelphia, but M. H. C. Place, acting under the instructions of defendant Justice, appeared and interposed an answer in their behalf.

The defendants, Hagy & Knowles, until the latter part of November, 1875, when they learned that they were parties to this suit, that an order of reference had been entered on the trial of the case, had proceeded until nearly the whole of plaintiff's proof had been introduced.

On December 1st, 1874, an order was entered substituting Mr. A. C. Thomas, instead of Mr. Place, who made the motion to cancel the appearance for defendants, Hagy & Knowles, from the denial of which motion this appeal was taken.

It was urged on the appeal that one partner had no right unless specifically authorized by his copartner to authorize an attorney to appear for his copartners.

Held, That the objection that the appearance for Hagy & Knowles by the first attorney was unauthorized is a valid objection. *Edwards v. Carter*, 1 Strange, 473; *Phelps v. Brewer*, 9 Cush., 390; 47 How., 470; 8 Paige 176.

But held that it is unnecessary to dispose of that question, as an attorney was afterwards substituted who was authorized directly by the defendants, Hagy & Knowles, to appear, and it would seem inequitable to have them relieved entirely from their appearance, they being now without the jurisdiction of the court, and the second appearance being authorized and regular. But they should not be concluded by the proceedings taken without their consent or knowledge. The order made should therefore be modified so far as to allow them to serve their answers to the complaint of the plaintiff within twenty days after notice of the entry of the

order to be entered on the decision of this appeal, and the order of reference should be wholly vacated without costs of appeal to either party.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring.

PRACTICE. SIAM ANSWER.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Gaul, *respt.*, v. The Knickerbocker Life Insurance Co., *applt.*

Decided March 31, 1876.

An affirmative defence, alleged upon information and belief, unsustained by proof, may be stricken out as sham.

Appeal from an order striking out an affirmative defence as sham.

This action is brought upon a policy of life insurance, issued by defendant, in favor of plaintiff, upon her husband's life, he having heretofore died. The answer, among other things, alleged upon information and belief that the insured had, since the issuing of the policy, become an inebriate and died in consequence of intemperance; and that in consequence, in accordance with its terms and conditions the said policy became and was void before the insured's decease. Plaintiff moved to have the allegation based on information and belief, as to the insured's intemperance, stricken out as sham, and the allegation as to the terms and conditions stricken out as irrelevant. A number of affidavits were read by plaintiff on the motion, showing insured to have been a sober, industrious man. No proof was offered by defendant to the contrary.

Motion granted.

J. A. Gross for *respt.*

F. C. Cantine, for *applt.*

On appeal *Held*, That if the alleged

fact which invoked the use of the terms and conditions was false, and was stricken out, they necessarily became irrelevant.

The alleged intemperance was based upon information and belief, and was the avowal of an affirmative defence. It was not sustained by any proof, and was shown by plaintiff to be false by overwhelming evidence. It was properly stricken out. The power of the courts to strike out affirmative defense averred upon information and belief, and not sustained by proof, is established by the court of last resort. (44 N. Y. 565; 45 N. Y., 281.)

Order affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

PROMISSORY NOTE. DEFENSE.

PHILADELPHIA COMMON PLEAS, No. 1.

Bank v. Marquis.

Decided March 18, 1876.

The pendency of a foreign attachment against the payee of a note in which defendant is made garnishee, is no defence to a suit by the holder against the maker.

Rule for judgment for want of a sufficient affidavit of defence.

Assumpsit on a promissory note drawn by the defendant to the order of one Strasburger, by whom it was endorsed and negotiated.

The affidavit of defence set forth that plaintiff's name was being used merely for the purpose of collection; that a suit of foreign attachment had been commenced against Strasburger upon the same note, in which defendant had been made garnishee, and that he was willing to pay the note, but was uncertain whether he should pay it under the attachment or the present suit.

Rule absolute.

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CONTRACT. NON-PAYMENT.
DELIVERY.N. Y. SUPREME COURT—GEN'L TERM.
FOURTH DEPARTMENT.Kester, *applt.* v. Reynolds, *respt.*

Decided January, 1876.

A contract to sell and deliver potatoes and ship them on the cars, where the parties have had other dealings, is not satisfied by a delivery at the depot, and party cannot rescind because no one is at depot to pay for them.

In May, 1874, an agreement was entered into, by letters, between plaintiff and defendant in and by which defendant was to sell to plaintiff a carload of potatoes, to be put in bags furnished by plaintiff, and to be delivered on the cars at Livonia Station, in this State, to be sent to plaintiff at Buffalo at the price of eighty cents per bushel.

Plaintiff did furnish bags; defendant put all of the potatoes in the bags and brought them to the station.

Plaintiff was not at the station to pay for the potatoes nor had they any one there to pay for the same.

Defendant refused to ship the potatoes, and this action was brought for damages for a breach of the contract.

On the trial plaintiff offered to prove that in prior deliveries between the parties when plaintiff made similar purchases of the defendant, defendant drew on plaintiff for the price after he had shipped the potatoes. This evidence was rejected and a judgment rendered for defendant.

M. C. Day for *applt.*

Nash & Southerland for *respt.*

Held, The non-suit we think was erroneously granted. No time was fixed

for the delivery of the potatoes, and the plaintiff could not have been expected to be at Livonia Station at any particular time to receive and pay for them. The parties, I think, did not contemplate payment at that place. The defendant was to put the potatoes in the plaintiff's sacks and ship them by the railroad to Buffalo, where the plaintiff resided. In the letter of defendant dated the 2d of May the defendant wrote the plaintiff that he had the potatoes bought and would ship them as soon as drawn in. This implies that he was to ship or deliver them on board the cars for the defendant, to be transported to Buffalo without previous payment. Nothing was said about payment, and it is perfectly clear, I think, that neither party expected payment to be made until the potatoes were received at Buffalo. Delivery to the carrier selected by the plaintiff was a delivery to them, and that was necessarily to precede the payment. Payment and delivery were not to be contemporaneous acts. The defendant had had, previously, dealings with the plaintiff, and proposed to send them the potatoes without pre-payment, trusting to their credit and responsibility. Doubtless he would have had the right to stop the potatoes *in transitu*, after delivery on board the cars, upon the insolvency of the vendees, or exact payment before they reduced them to actual possession. But he was bound to do the first act. He was bound to put the potatoes into plaintiff's sacks and deliver them to the carrier for shipment to him at Buffalo. The sending back their sacks unfilled, coupled with proof of the sale and delivery of the potatoes purchased and put in them, to Comstock, was a breach of the contract on the defendant's part, and a refusal to fulfil the

same, and in any view excused the plaintiff from the necessity, if any such ever existed, of demanding the potatoes and tendering the price. It was error, also, to refuse to allow the plaintiff to show the course of the dealings between them and the defendants. Extrinsic facts of this kind are always admissible to aid in the interpretation of contracts and what is rationally and naturally inferable, or to be implied as to the understanding and intent of the parties at the time of the making of the contract should be deemed part of or included in it. The non-suit should be set aside and a new trial granted upon the usual terms.

Opinion by *E. Darwin Smith, J.*

RECEIVER, AUTHORITY OF.

N. Y. COURT OF APPEALS.

Hurmans, Trustee, &c., *applt.* v. Clarkson, *respt.*

Decided February 8, 1876.

An order "to execute and acknowledge formal satisfaction and discharge of all real estate mortgages" held by a receiver, authorizes him to satisfy and discharge, upon payment, a mortgage not yet due.

This action was brought by plaintiff, as trustee of F., among other thing to set aside a satisfaction and discharge of a bond and mortgage made by one B., a receiver appointed in an action in which F. was plaintiff, and the plaintiff herein, defendant. The order appointing the receiver gave him power "to lease the real estate and receive the rents and profits thereof, and sue for and collect such debts as are or may become due. A subsequent order was made June 2, 1870, in the action, by which the receiver was authorized and empowered "to execute and acknowl-

edge for record, formal satisfaction and discharge of all real estate mortgages, which came to him as receiver, upon the payment to or collection by him thereof of debts in payment of which they are given to secure." The mortgage in suit was paid to the receiver while this order was in force, by Mr. Hill before it was due, without the previous request of the mortgagor, but the payment was afterwards ratified by him.

A. Hadden, for applt.

S. S. Rogers, respt.

Held, that the order of June 2, 1870, was broad enough to authorize the receiver to receive the money unpaid on mortgages held by him as receiver, whether due or not at the time of payment; that the ratification of the payment by the mortgagor after its receipt by the receiver was equivalent to an original authority to make the payment (Story on Ag. § 239, 15 N. Y., 580), and that the mortgage was properly ratified and discharged.

Judgment of General Term affirming judgment for defendant, affirmed.

Per curiam opinion.

SETTLEMENT OF CASE.

GENERAL TERM SUPREME COURT. FIRST DEPT.

John Bohnet, *applt.* v. Leopold Lithauer, *respt.*

Decided March 31, 1876.

The forty-first rule of the courts of record of New York State does not entitle the party making a case as a matter of absolute right to the use of the stenographer's notes.

Any other statement showing what the evidence was may be used instead of those notes.

The matter has been committed very much to the judgment and discretion of the justice before whom the trial may be had.

Appeal from order denying motion for resettlement of case.

On the settlement of the case the justice by whom it was settled refused to allow a portion of the notes of the stenographer to be inserted in the case, and substituted, in place of it, a statement of the evidence deemed by him the most correct. Plaintiff then moved for a resettlement of the case which motion was denied.

On appeal.

J. W. Cowrell for applt.

D. Leventritt for resp't.

Held, That rule forty-one does not entitle the party making a case as a matter of absolute right to the use of the stenographer's notes. That may be done if the justice settling the case deem that the proper course; any other statement showing what the evidence was may be used instead of those notes. The matter has been committed very much to the judgment and discretion of the justice before whom the trial may be had. It would be much better for the parties, their counsel and the court afterwards hearing the case, if an abridged statement should be made containing only the evidence material to be considered in reviewing the trial and inserted in it, instead of the stenographer's notes at large which often contain a mass of irrelevant questions and answers far exceeding, in bulk and extent, all that can properly be considered or found important on the examination and decision of the case. There was no impropriety in the course pursued in this instance.

Order affirmed with \$10 costs and disbursements.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring.

CRIMINAL PRACTICE. WRIT OF ERROR.

N. Y. SUPREME COURT, GENERAL TERM.
FOURTH DEPARTMENT.

The People *ex rel*, v. Henry Woodin.

Decided January, 1876.

The office of the writ of error is to remove a criminal record from an inferior to a higher criminal jurisdiction. The county clerk should make return thereto.

The writ of error should always contain the judgment record in form required by §4 of article 1, chap. 2 revised statutes.

The defendant in this case was indicted for the offence of subornation of perjury. He was tried at the Court of Sessions, convicted, and sentenced to state's prison for nine years and six months. This is a writ of error brought to review the exceptions taken on the trial.

E. G. Lapham for the prisoner.

E. Hicks, Dist. Att'y for the people.

Held, The office of a writ of error as retained in this State is to remove a record from an inferior court, exercising criminal jurisdiction, according to the course of common law, into this court, and also from this court to the Court of Appeals. It can only issue after final judgment in the inferior court, and this appellate court can only review such judgment, and affirm or reverse the same.

The statutes, 2 Revised Stat., 741, Sec. 20, requires that "upon every writ of error being filed which shall operate as a stay of proceedings, it shall be the duty of the clerk of the court to make a return thereto without delay, containing a transcript of the indictment, bill of exceptions and judgment of the court certified by the clerk thereof.

The case before us contains the writ

of error, indictment and bill of exceptions, but no judgment record or judgment in the form prescribed by statute. Sec. 4 of art. 1, chap. 2 of title 6 of vol. 2 of revised statutes, p. 738, provides that if the district attorney, upon request therefor, neglects for ten days after a conviction or acquittal to make up a record of the judgment, the defendant may cause the same to be made up; and sec. 5 provides that whenever a judgment upon a conviction shall be rendered by any court it shall be the duty of the clerk to enter such judgment fully in his minutes, stating briefly the offenses for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts.

No such judgment or judgment record is returned to the writ, or appears in the case. There is, therefore, nothing before us to review.

For want of such judgment record, the court in *Dawson v. The People*, 5 Parker Crim. Rep. 118, quashed the writ of error, and for want either of such judgment record or judgment, the writ was dismissed in *Hildebrand v. The People*, 8 N. Y. Sup. Court Rep. 19.

I have no doubt that a common law record of judgment should, in all cases, where the remedy is by writ of error, be made out and brought up for the review of a conviction in an inferior criminal court. This is at least the better practice if not indispensable, and would obviate many of the embarrassments attending the review of such conviction in this court, and in the Court of Appeals.

We can, in this case, only dismiss the writ—and it is dismissed.

Writ dismissed.

Opinion by *E. Darwin Smith, J.*

HUSBAND AND WIFE. LANDLORD AND TENANT. EVIDENCE.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Roberts, applt. v. Heap, respt.

Decided January, 1876.

In the absence of the husband the wife may act as his agent and rent a house, and bind him for rent, &c.

Evidence of how defendant occupied other houses than one in suit inadmissible.

The defendant is a married man, and being away from home, his wife hired of plaintiff a house in the city of Utica. Plaintiff claims that the term was fixed for one year, and defendant insists that no time was fixed.

Defendant occupied the premises six months, and then left, and this action is brought for the rent for the last six months of the year.

On the trial, the defendant, under objection, was allowed to prove that when he lived in another house his employment could be terminated on thirty days notice. He was also allowed to prove that one house he occupied prior to this, was occupied by the month.

The action was tried, originally, before a justice of the peace; was appealed to the county court, where there was a judgment for the defendant.

S. M. Lindsley, for applt.

Goodman & Porter, for respts.

Heid, The defendant was clearly bound by the contract of his wife in renting the house. Where the husband is absent from home the wife is necessarily his agent to make such contracts and purchases as are proper for the support and maintenance of the family, according to his circumstances and condition in life. The only substantial

question at issue on the trial was, what were the terms of the lease taken by her, whether it was a renting by the month or the year. The case was fairly submitted to the jury upon that issue, and their verdict could not be disturbed except for an error in the reception of evidence. The defendant, under objection, was allowed to prove that he had previously occupied a house of Mr. Hael, and that by the arrangement with Mr. Hael, he could give up his employment, and had the right to leave on thirty day's notice, and that he was living there in Mr. Hael's house by the month. This evidence was inadmissible, and was likely to have some influence on the jury, in leading them to the conclusion, corroborative of Mrs. Heap, that the renting of the plaintiff's house was also by the month. For this error we think the judgment should be reversed, and a new trial granted with costs to abide the event.

New trial granted.

Opinion by *E. Darwin Smith, J.*

PRACTICE. EXCEPTIONS.

N. Y. SUPREME COURT, GEN. TERM.
FOURTH DEPARTMENT.

Moore, et al., *appls.*, v. Bristol, et al.,
respts.

Decided January, 1876.

In order to take advantage of a refusal of the judge to submit a specific question of fact to a jury, there must be a specific exception to such refusal.

An exception generally to the direction of the court to the jury to find a verdict for the defendant, is not sufficient.

Plaintiffs were partners in business. Defendant is a deputy sheriff, and under an execution had seized and sold two colts, which plaintiffs claim be-

longed to them. Plaintiffs claimed title to the colts under a chattel mortgage or bill of sale.

The only question litigated upon the trial was whether the mare in controversy, from which the colts were foaled, was embraced in the sale by a Dr. Smedley to Simmons. She was not in terms included in it. Its language is, "all the property in use in the hotel business."

W. S. Newman for applt.

L. A. Nash for resp't.

Held, Perhaps enough evidence as to whether the mare was included in the sale was given by the plaintiffs to entitle them to have the question submitted to the jury. But they made no request that it should be so submitted. They merely excepted to the direction of the court to the jury to find a verdict for the defendant. In the absence of such a request the circuit judge was right in directing a verdict, because there was a decided preponderance of evidence that the mare, and consequently the colts, replevied, were in fact the property of Dr. Smedley, and were not embraced in the bill of sale to Simmons, which constituted the only basis of the plaintiffs' title. *Sheldon v. Atlantic F. and M. Ins. Co.*, 26 N. Y., 46; *Stone v. Flower*, 47 id. 566. In such a case an exception to the direction of the judge is insufficient to raise the question whether he should have sent the case to the jury.

A new trial must be denied, and judgment must be ordered for the defendant on the verdict.

Opinion by *Gilbert, J.*; *Mullin, P. J.* and *Smith, J.*, concurring.

GUARDIAN.

N. Y. SUPREME COURT—GENERAL TERM
FOURTH DEPARTMENT.

Ashley, *respt.* v. Sherman, *applt.*

Decided January 1876.

The inadequacy of the security given by a guardian ad litem, and his compromise of suits without the knowledge of his ward, and without the sanction of the court, does not furnish sufficient cause for removing such guardian, without first affording him an opportunity to explain his conduct.

In this case, the infant was sixteen years of age, and the guardian was appointed on her petition, on his giving security in the sum of two hundred dollars, and thereupon he commenced three actions in behalf of the infant, namely, one to recover the sum of fifty thousand dollars, another to recover a large and valuable real estate, and another to recover thirty thousand dollars for property converted, and money received by the defendant in that suit. The guardian entered into an agreement with the defendant in the first action for a compromise and a settlement thereof, under which he has received eight or nine thousand dollars, without giving additional security. Such compromise was made without the knowledge of the infant, or those who had the custody of her person, and without the sanction of the court. The guardian is the father of the infant, but from the time she was three months old until the present time she has lived with her foster father, or his son in a distant state.

The court below put its decision, directing the removal of the guardian upon the ground that he was not acting in good faith toward the infant, and that he threatened to defeat the interest

of the infant, if he should be removed.

Held, That there is no evidence of any such threat as claimed, and a court would not be warranted in sanctioning the inference drawn by the court below, considering that the guardian is the father of the infant and that the evidence against him is not of a satisfactory character.

The order appealed from should be reversed and a reference ordered.

Opinion by Gilbert, J.; Mullin, P. J., and Smith, J., concurring.

ILLEGAL FEES. VOLUNTARY
PAYMENTS.

N. Y. SUPREME COURT. GENERAL TERM,
FOURTH DEPT.

Scholey, *exr.*, *respt.* v. Mumford
exr., *applt.*

Decided January, 1876.

Whether a payment is voluntary or not is a question of law.

Where illegal fees are demanded and paid as a condition of giving up certain property, such payment is not voluntary.

Plaintiff's testator held certain bonds as executor. He demanded, before delivering up the bonds, certain fees, which were illegal. The fees were finally paid, and this action is brought to recover back such fees.

F. A. McOmbee for *respt.*

George F. Dunforth for *applt.*

Held, The exaction of the illegal commissions, as a condition of delivering the bonds, stands upon the pleadings substantially admitted. The plaintiff demanded the bonds; the defendant offered to deliver them on payment of such commissions; the commissions were paid and the bonds were delivered.

Whether a payment made under such circumstances is a voluntary one

or not, is a question of law. The Court of Appeals have held, in this very case, that it is not, and such must be deemed the law of the case.

The judgment must be affirmed.

Opinion by *Gilbert, J.*; *Mullin, P. J.*, and *Smith, J.*, concurring.

SOLD NOTE.

U. S. SUPREME COURT.

Benjamin F. Butler, plaintiff in error,
v. Alexander A. Thomson and William Thomson, defendants in error.

Decided April 24, 1876.

A sold note signed by the broker of both parties necessarily imports a purchase of the articles therein described, and binds the vendee as well as the vendor.

In error to the Circuit Court of the United States for the Southern District of New York.

The plaintiff alleged that on the 11th day of July, 1867, he bargained and sold to the defendants a quantity of iron thereafter to arrive, at prices named, and that the defendants agreed to accept the same and pay the purchase money therefor; that the iron arrived in due time, was tendered to the defendants, who refused to receive and pay for the same, and that the plaintiff afterwards sold the same at a loss of \$9,581, which sum he requires the defendants to make good to him. The defendants interposed a general denial.

Upon the trial the case came down to this: The plaintiff employed certain brokers of the City of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at 12½ cents per pound in gold, cash.

The following memorandum of sale was made by the brokers, viz:

"NEW YORK, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first quality Russia sheet iron, to arrive at New York, at twelve and three-quarters (12¾) cents per pound, gold, cash, actual tare.

"Iron due about Sept. 1, '67.

"WHITE & HAZZARD, *Brokers.*"

The defendants contend that under the statute of frauds of the State of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the circuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken.

The provision of the statute of New York upon which the question arises (2 R. S., 136, §3) is in these words: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money."

The 8th section of the same title provides that "every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

There is no pretence that any of the goods were accepted and received, or that any part of the purchase money was paid. The question arises upon the first branch of the statute, that a mem-

orandum of the contract shall be made in writing, and be subscribed by the parties to be charged thereby.

The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the instrument, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy, and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. There is a contract of sale, it is argued, but no contract of purchase.

Held, Both have signed the paper, and if a contract is created it is a mutual one. Both are liable, or neither.

It seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price.

Judgment reversed, and cause remanded to the circuit court for a new trial.

Opinion by *Hunt, J.*

INSPECTION OF PAPERS.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Brooklyn Life Insurance Co., *respt.*,
v. *Pierce, et al.*, *appls.*

Decided March 31, 1876.

In application for inspection, facts should be given which would enable the court to determine whether the evidence so sought is material.

Appeal from order denying motion for the inspection and copy of papers in the possession of the plaintiff.

Issue was joined in this action in December, 1874, when the cause was noticed and put upon the calendar. In December, 1875, it was reached, and reserved generally by plaintiff's attorney, defendant not appearing; at defendant's request the trial was delayed until the middle of January, 1876; then plaintiff served notice of a motion to put the cause down for January 28. On the morning of that day notice of motion for inspection of certain letters in plaintiff's possession, was given by defendant, and plaintiff's proceedings stayed. The affidavit on which the motion was made, failed to show wherein the evidence contained in the letters was material.

The motion was denied because,
1. The proper degree of diligence had not been shown, but rather negligence and laches.

2. The evidence did not show the materiality of the evidence sought.

3. And that an ordinary notice to produce on the trial would afford the necessary proof.

A. Ford, for *respt.*

S. K. Williams, for *applt.*

On appeal *Held*, That the notice was properly disposed of by the court below. The affidavit fails to show how the evidence alleged to be contained in the letters, of which copies are sought, is material to any issue in this case.

Facts should be given which will enable the court to determine for itself whether the evidence is material.

The evidence sought for can be proved in the ordinary way.

If the plaintiff fails to produce the letters on the trial, after proper notice,

their contents may be proved by parol evidence.

Or er affirmed.

Opinion by *Davis, P. J.*; *Daniels* and *Brady, J.J.*, concurring.

TITLE TO REAL ESTATE. EVIDENCE.

N. Y. COURT OF APPEALS.

Howard et al., respts. v. Moot, applt.
Decided February 22, 1876.

The rules of evidence are entirely within the control of the legislature, which may make such rules and regulations in regard thereto as it deems best.

A will having been admitted to probate, it can only be impeached by direct proof of incapacity, as competency will be presumed until the contrary is shown.

The Indian title to lands in this state extends only to the right of occupation, and when they abandon possession, the right of possession attaches itself to the fee without grant.

The court will take judicial notice of the extinguishment of the Indian title.

This action was brought to recover a hundred acres of land, in Livingston county, which was a portion of the Pultney estate, and the only question involved in the case was the title to that estate. Plaintiffs claimed title through several mesne conveyances from the state of Massachusetts, it being a part of the tract ceded to that state by the state of New York by the treaty and deed of cession of 1786. This title has been frequently passed upon and sustained by the courts. (9 Barb., 595; S. C., 3 Seld., 305; 51 Barb. 589; 41 N. Y. 397.) Some other exceptions were taken in this case.

In 1821 an act was passed by the legislature (laws 1821, chap. 19), entitled "An act to perpetuate certain tes-

timony respecting the title to the Pultney estate in this state," which provided that the testimony taken under the direction of the court of Chancery should be *prima facie* evidence of the facts set forth in the examination of the witnesses, if the chancellor should be of opinion that they furnished good *prima facie* evidence of such facts. It was objected upon the trial that the legislature had no power to authorize the testimony to be taken *de bene esse*, without giving any adverse party the right of cross-examination, and that the testimony as given in the deposition was mere hearsay evidence, and was incompetent.

Wm. Rumsey, f r respts.

Scott Lord, for applt.

Held, That the legislature had power to pass the law; that rules of evidence are not an exception to the doctrine that the legislature has absolute control over the remedies by which rights are to be enforced or defended, and all rules and regulations affecting the same; and the changes from time to time may be made applicable to existing causes of action, as the law thus changed would only prescribe the rule for future controversies; that the declaration that any circumstance or evidence should be *prima facie* proof of a fact to be established would not be void, as indirectly working a confiscation of property, or a destruction of vested rights, as the adverse party was left at liberty to rebut and overcome it by contradictory and better evidence. (2 Kern., 541; 38 Barb. 608; 6 Gray 1; Cooley's Const. Lim. 367.)

Also *Held*, That if the testimony had been all hearsay, the legislature having made the chancellor the final arbiter to determine what should be

good *prima facie* evidence of the facts stated, it would be in the absence of evidence to controvert it or suggestion that it was untrue, be conclusive. It was objected at the argument that the chancellor merely certified that the depositions were *prima facie* evidence that the witnesses had heard and believed as they stated.

Held, That this objection was not tenable; that the certificate related to facts which the statements tended to prove, and to prove which the depositions were taken, and to perpetuate the proof of which the act was passed.

The will of Sir John Lowther Johnston was objected to as in evidence upon the ground that it did not appear that he was twenty-one years of age, and he being an alien was incapable of making a devise of real estate in this state.

Held, That the will having been regularly admitted to probate it could only be impeached by direct proof of incapacity, as competency would be presumed until the contrary is shown; also that the testator, notwithstanding his alienage, had a right to devise. (3 Seld. 305.)

Several objections were urged to the title of the state of Massachusetts by reason of a failure to extinguish the Indian title, and to comply with other conditions of the compact between the states.

Held, That the Indian right of occupation (which was the extent of their rights), could not be disposed of except to the government, or to one who had acquired the *préemption* right from the government (3 Kent's Com., 79, 80; 11 Paige, 607; 20 J. R. 693; 8 Wheat. 543; 19 Wall. 698), and the possession having been abandoned by the Indians, attached itself to the fee with-

out grant. (3 J. R. 375.) Also that the court would take judicial notice of the extinguishment of that right (41 N. Y. 397); as to whether one without title could set up this objection against the owner in fee, *quære*.

Judgment of General term affirmed.

Opinion by *Allen, J.*

DEBTOR AND CREDITOR.

N. Y. SUPREME COURT. GENERAL TERM.

FIRST DEPARTMENT.

Charles S. Archer *ply.* and *applt.* v. James O'Brien, sheriff, *deft.* and *respt.*

Decided

If a creditor has a lawful and bona fide debt, it is lawful for the debtor to turn over to the creditor any of his personal property as security for said debt, if the creditor takes immediate possession and continues such possession.

If the creditor make any arrangement to protect the debtor by holding the property for some purpose other than the payment of his demand, he loses all advantage by the unlawful combination.

This action is brought by plaintiff to test the title to the personal property and machinery of a distillery situated in New York city. Plaintiff was a large creditor of one Hanlon and in payment of the debt, December 8, 1865, took a bill of sale from one England of the aforesaid property, he holding the legal title, Hanlon being the real owner of the property aforesaid. The sheriff claimed title thereto under and by virtue of an attachment levied on the property of Hanlon at the suit of one Chas. Doherty. The property was contained in the distillery aforesaid. On receiving the bill of sale the plaintiff sent word to one Wilson to come down to his store, and on the 9th of December, 1868, he put

him in possession of the property in question to hold it as his agent. Wilson remained on the premises until the sheriff took possession.

When the cause was submitted to the jury the plaintiff's counsel requested the court to charge the jury:

1. If Archer had a lawful and *bona fide* debt against Hanlon, it was lawful for the latter to turn over to said Archer any of his personal property as security for said debt, if the latter took immediate possession thereof and continued such possession.

If the plaintiff took possession of said property, involved in this suit, under a transfer made to him as security for a lawful debt, and such transfer was made and possession taken before the sheriff levied, then the plaintiff is entitled to recover, even though the owner of the property was Hanlon's at the time it was so turned over.

That the title of the plaintiff, under the circumstances stated, must prevail over the seizure by the sheriff under the attachment.

The judge charged the above requests with considerable modification.

The judge also charged the jury that it was for them to inquire whether this transaction was surrounded with such circumstances as would put an ordinary and prudent man upon inquiry. "If you find that it was, and Archer failed to make these inquiries, and that Hanlon had this fraudulent intention, then, although Archer did pay the money, he was not a purchaser in good faith."

D & T. McMahon for applt.

A. J. Vanderpoel for resp't.

Held, Plaintiff was entitled to have the aforesaid requests to charge charged without modification. There are no superior equities in favor of either of the

creditors of the same class. The principles which govern the relations of the purchaser from a fraudulent vendee are not applicable. In such case an assignment is subordinate and inferior to the superior and prior equity of the defrauded owner, and cannot be sustained without proof of a consideration other than the discharge of a precedent debt. The burden of carrying the effect of circumstances likely to cause a prudent man to make inquiry when a debtor is willing to secure a debt due by the transfer of his property cannot be imposed upon the creditor. He has the right to accept the security, and it matters not what the debtor's intentions are. If the creditors wish to obtain the property thus transferred, they can pay the debt and be subrogated. The creditor, when he discovers circumstances that would put a prudent man on inquiry, will be protected in the preservation of his own rights in seeking the payment of his own debt. Such creditor is not surrounded with the exigencies of a stranger who purchases from a failing debtor under suspicious circumstances.

If the creditor make any arrangement to protect the debtor by holding the property for some purpose other than the payment of his demand, he loses all advantage by the unlawful combination. If he have no notice of a fraudulent intent his rights should not be impaired. If he accept the subject assigned as a security for the payment of his debt, he does no wrong.

Judgment reversed.

Opinion by *Brady, J.*; *Davis, P. J.* and *Daniels, J.*, concurring.

INJUNCTION. RECEIVER.
N. Y. SUPREME COURT—GENERAL TERM,
FIRST DEPARTMENT.
O'Brien, resp't. v. O'Connell, The St.

Patrick Mutual Alliance Association, impleaded, &c., *appls.*

Decided March 6, 1876.

A member of a corporation may no bring an action individually for the distribution of funds belonging to the corporation but in the possession of a third party, without first showing the corporation's refusal to do so, or collusion.

Appeal from order of special term appointing a receiver and continuing an injunction.

In 1869 plaintiff become a member of The St. Patrick Mutual Alliance Association, which was then a voluntary unincorporated association. The association was maintained by payment on the part of its members of initiation fees and monthly dues. The membership being large, it had accumulated nearly \$5,000. Dissensions having arisen, the association was divided into two factions. Plaintiff alleged that the majority, and of which he was one, filed articles of incorporation as the St. Patrick Mutual Alliance and Benevolent Association, and that it was the rightful owner and custodian of all the funds of the original association; that the others, in which were the former officers of the original association, thereafter incorporated themselves under their former name, retained all the funds and property of the original association. Plaintiff brings this action in his own behalf and in behalf of all other members who shall desire to assist him in prosecuting the same, and to share in the benefit, to have the defendants enjoined from using or interfering with the funds of said original association, and to have such association dissolved, a receiver appointed, an accounting and distribution of the funds among the members in good standing.

One other, only, joined with him.

No reason was given by plaintiff why this action was not brought by the St. Patrick Mutual Alliance and Benevolent Association, nor was any fraud or collusion on its part charged.

On appeal.

Held, That if, as alleged by plaintiff, the association was duly incorporated under the name of the St. Patrick Mutual Alliance and Benevolent Association, and it may be taken to be true as against the plaintiff, then the funds and property of the association must have become vested in the corporation and an action for their protection should have been brought by it and not by plaintiff, or its refusal so to do, or its collusion with defendants should have been shown.

Plaintiff, upon his own showing, had no direct interest in the fund and property claimed, and for that reason his application for an injunction and receiver should be denied.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.*, concurring

TRUSTEE. CONTRACT.

N. Y. COURT OF APPEALS.

Belmont, *respt.* v. Pouvert, *applt.*

Decided January 18, 1876.

Under an agreement by which several leinors of land combined to perfect title in one who was to pay all the liens out of the future proceeds of said property, under which agreement title was perfected and rents collected, the one in whom the title became vested is bound to account, as trustee, for the rents so collected; the words "future proceeds" are sufficiently comprehensive to include rents and profits.

This action was brought to compel the sale of certain real estate, the legal

title to which was in defendant in trust, and for the application of the rents collected by them to the payment of certain liens upon the property according to an agreement between plaintiff and defendant P and one S., dated December 13, 1849, in which it was agreed that certain liens should be paid out of the "future proceeds of said property." There could be no final disposition of this land until the question of the title of one T. was determined, and that was to be the subject of a serious litigation. The parties to the agreement had no title to the land, but simply liens upon it, which depended entirely upon T's title; and they therefore combined to sustain the title at their joint expense. There was no provision in the agreement for any sale of the property or anticipation that a sale would ultimately be made by virtue of some of these liens, the parties agreed that their claims should not be used by either of the parties to the prejudice of the other or otherwise than to perfect the title in order to carry out the agreement and cut off other liens and incumbrances. The title was finally perfected and became vested in defendant P, for the benefit of the parties to the agreement, and by virtue thereof the rents of the property were paid to him. It appeared, also, that the title was confirmed in P. not only at the joint expense of the parties to the agreement but by reason of the forbearance of the plaintiff in reliance thereon to redeem under a sheriff's sale of the property, the time for which expired two days after the agreement was entered into.

W. W. MacFarland for applt.

C. W. Sanford for resp't.

Held. That defendant P. was accountable for the rents collected by him and

for all rents he should collect up to the time when a sale should be had, or so much of them as may be required, with the proceeds of the sale to satisfy the liens mentioned in the agreement.

That the words "future proceeds" as used in the agreement were sufficiently comprehensive to include the rents and profits of the real estate.

Judgment of general term affirming judgment of special term affirmed.

Opinion by *Rapallo, J.*

WAREHOUSE RECEIPTS.

ST. LOUIS COURT OF APPEALS.

Central Savings Bank v. Garrison, et al.

Decided April, 1876.

The transfer of a warehouse receipt, although in blank, and the transferee unknown to the warehouseman, yet if the latter have notice of transfer, he becomes the bailee of the transferee, and is bound to hold the deposit for him as owner.

Where a warehouseman, having general notice of the transfer of a receipt given by him, permits the property to be taken from him by legal process, he will be liable to the transferee for the amount advanced by him on the receipt.

Defendants were general warehousemen in September 1871, and received from one Quinn, on storage, a lot of whiskey and wine, giving him a negotiable receipt therefor. Quinn thereupon transferred the receipt to plaintiff as collateral security for a loan of \$200, giving his note for the amount, with an agreement showing the details of the transaction. Afterwards the goods were attached by a creditor of Quinn's, and sold by the sheriff under execution upon the judgment which ensued. Quinn having absconded, this suit was

instituted to inuenuify plaintiff for its loss of the security upon the loan made to him.

The warehouse receipt was regularly endorsed by Quinn to the plaintiff, and bore a written or printed acknowledgement of notice of transfer, signed in blank, (the name of the transferee being omitted) by the defendants. The defendants had, however, no actual notice or knowledge of the transfer to plaintiff, until after the sheriff's sale of the property; nor had the plaintiff, until after the same event, any notice of the attachment.

Defendants paid no attention to the attachment suit, or the seizure and sale, but permitted them to take their course. The case being submitted to the court without a jury, upon the agreed facts, judgment was rendered for the defendants.

The statute of Missouri makes warehouse receipts negotiable by written endorsement thereon and delivery, in the same manner as bills of exchange and promissory notes. It makes the transferee the owner of the goods, wares, etc., represented by the receipt, and prohibits the delivery of such goods to any person except on surrender and cancellation of the receipt.

By section 10 of the same act (Wagner's Stat., page 221), it is declared that "so much of the preceding sections of this act as forbids the delivery of property, except on surrender and cancellation of the original receipt or bill of lading * * * shall not apply to property replevied or removed by operation of law." Here is a complete defence against the plaintiff's claims in this relation.

Held, The defendants signed in blank an acknowledgement of notice of

the transfer of their receipt. The omission of the name of the transferee simply gave to a *bona fide* holder the right to fill the blank at any time, even at the trial if necessary. Was the effect of this acknowledgement materially changed by the fact that defendants had no actual knowledge of the party to whom the transfer was made? Let us first inquire what would have been the effect of such actual knowledge, if present. The defendants would thereby have become bailees of the plaintiff for all purposes. Upon the levying of the attachment, their first duty would unquestionably have been to inform plaintiff of the fact, so that he might protect his property by the means which the law has provided. This duty would have involved a liability for all damages resulting to the plaintiff if they failed to perform it.

The written acknowledgement of notice signed by the defendants was at least an admission that they assumed all the responsibilities which would attach to notice in fact. It was a waiver of further notice. It was a declaration to the transferee, whoever he might be, that he might treat them, in every respect as his acknowledged bailees; and that they would never attempt, upon any plea of want of notice, to evade the duties and liabilities belonging to that position. It was upon this information, thus given to plaintiff, that the latter advanced this money to Quinn. The law of estoppel can find no better application in the range of human affairs. To permit the defendants now to deny actual notice of the plaintiff's rights as transferee, with a claim of immunity from the legitimate consequences of such notice, would be to repudiate all the learning on that sub-

ject. However honest may have been the defendants' intentions in the present case, we can not thus open the door to possible frauds in commercial circles, where fair dealing is of paramount interest to the entire public at large.

It thus appears to us that a very important feature in the plaintiff's rights was ignored by the circuit court. For this reason the judgment is reversed, and the case remanded.

Opinion by *Lewis, J.; Gantt, J.*, concurring.

BILL OF EXCHANGE.

ENGLISH HIGH COURT OF JUSTICE,
COMMON PLEAS DIVISION.

Harvey v. Crane.

Decided February, 1876.

Where a bill is accepted and handed over for value, but at the time of acceptance there is no drawer's name on it, any bona fide holder for value is entitled to insert his own name as drawer and to sue the acceptor for the amount of the bill.

This was an action on a bill of exchange. A verdict was found for the plaintiff. The facts as found at the trial were that one Chippendale had sent a bill with the drawer's and acceptor's names in blank, to the defendant, who signed it as acceptor and returned it to Chippendale. The bill purported to be for value received in corn. The plaintiff received it *bona fide* and for value, without notice of anything affecting it from Chippendale, and filled in his own name as drawer.

Motion for judgment for the defendant on the above facts.

Held, That this application must be refused. There are two questions: first, whether, to such a bill, being given in the course of business, the plaintiff was

entitled *prima facie* to add a drawer's name; and, secondly, had he authority actually given him to add the name? I am of opinion that he could add the name. Chippendale was given power to negotiate the instrument, and that without any stipulation by the defendant. Mr. Justice Maule, in *Mountague v. Perkins*, says: "The defendant, when he wrote his name in blank and issued this acceptance, must have known, what was obvious to anybody, that he put it in the power of any person to whom he gave it to fill it up." That applies to the present case. *Cruchley v. Clarence* does not go so far as Mr. Channell contended for, but the judgment of Lord Ellenborough is strong, for he says: "As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant by leaving the blank undertook to be answerable for it when filled up in the shape of a bill." Mr. Justice Byles, in his book (p. 187), says: "It is not even necessary that the bill should be drawn by the same person to whom the acceptor handed the blank acceptance." *Stoessiger v. The Southeastern Railway Company* was different, for there the question was whether the document was a valuable instrument before any drawer's name was put in, and on that Chief Justice Erle chiefly relied in *M'Call v. Taylor*. So again in *Awde v. Dixon*, the bill was given to be used in a different way from that in which it was afterwards used. We need not decide any question as to who was a *bona fide* holder, as the evidence shows that the document was given for the purpose of circulation, and all usual rights would follow.

Opinion by *Grove, J.; Denman, J.*, concurring.

CHARGE OF JUDGE.

N. Y. COURT OF APPEALS.

Sloane, *applt.* v. Elmor, *respt.*

Decided February 15, 1876.

The rule that if the charge does not mislead the jury, a new trial should not be ordered, applied to a peculiar case.

This action was brought to recover damages for an injury to plaintiff's wife by a collision between the plaintiff's carriage and one alleged to belong to defendant, caused by the negligence of the driver of the latter. It was conceded that defendant had formerly employed the coachman and owned the carriage and horses, but he claimed that a short time before the collision occurred he had sold them to his son, who, in turn, sold them to his sister, Mrs. H. The defendant testified, generally, that he sold the carriage and discharged the coachman; and Mrs. H. testified that she owned the former and employed the latter. The coachman testified, on his direct examination, that he drove for Mrs. Hunt at the time of the accident, but on his cross examination he stated that when first employed he went to defendant's house and saw Mrs. Hunt, and she told him to come around and see her father, the defendant; that he went, and then said he did not know who hired him, but that Mrs. H. always paid him, and that no other arrangement was ever made with him. At this time defendant owned the carriage and horses. It was not claimed that there was a change of employment save as resulting from the alleged change of ownership. This was claimed by plaintiff to have been merely colorable. It appeared that Mrs. H. resided with the defendant and was in the habit of paying the servants and other bills for him. The court charged

that if defendant did not own the carriage and horses no recovery could be had. Defendant's counsel requested the court to charge that if the jury found the coachman was not defendant's servant, but was in the employ of Mrs. H., they could not find for the plaintiff. The judge remarked that he could not see how the two things could be separated, and the defendant excepted to the refusal to charge.

A. R. Dyett for *applt.*A. J. Parker for *respt.*

Held, no error; that the court did not intend to hold as matter of fact that the request was not correct, but only intended to say that under the evidence, as a question of fact, the ownership of the carriage and horses and the employment of the coachman, could not be separated; that the latter depended upon the former, and that the jury could not have been mislead.

Judgment of general term, reversing judgment for plaintiff and granting new trial, reversed, and judgment on verdict affirmed.

Opinion by *Church, Ch. J.*

TRUST-DEED. GIFT.

N. Y. SUPREME COURT, GEN. TERM,
FOURTH DEPARTMENT.Hill, *respt.*, v. Hurmans, *applt.*

Decided January, 1876.

A trust-deed in and by which the grantor conveys all his real and personal property, in order to be relieved of the care of it, does not include family portrait.

Such a deed should be liberally construed.

In October, 1868, one F., who was a man of large means, conveyed to defendant and his heirs and assignees all his real and personal property, and to have

and hold the same, &c., irrevocable, and for certain trust purposes therein named.

The plaintiff is the sister of F., and had lived with and kept house for F., for over thirty years prior to his death.

F. died in 1873, and defendant excluded plaintiff from the house. Prior to his death, and subsequent to October 1868, F. had presented to plaintiff certain personal property, and amongst the rest, a portrait. This portrait defendant took and refused to deliver the same to the plaintiff, and to recover the same this action was brought.

There was a judgment for plaintiff.

Brown & Hadden for applt.

Geo. W. Bradley for resp't.

Held, The judgment in this case, we think, should be affirmed. The deeds from Mr. Fellows to the defendant of the dates of October 10, 1868, and of June 29, 1871, should receive a reasonable construction, in view of the subject matter to which they relate and the object for which they were made, and the intrinsic circumstances of the case.

Mr. Fellows, it appears, an old man of great wealth, tired and oppressed with the cares of his large property, proposed to get relief to himself for the remaining period of his life by trusting to the defendant the management of his property, with power to sell the same and pay to him the proceeds, so far as such property was sold and converted into money, during his lifetime, and with this view, executed said deed for such purpose. He clearly could not have contemplated or intended to strip himself, or the house in which he lived with his aged sister, the plaintiff, of the articles of his household furniture and other personal property in such house essential to his comfort, and have the

same sold by the defendant and converted into money to be immediately paid over to him by the said defendant.

As he would be entitled to the proceeds of all sales, he was clearly entitled to retain any of the articles of such property to himself and convert them to his own use in lieu of the money. He might, we think, forbid the sale of family pictures and furniture, including this portrait of himself, and give it to his sister as well, and with as much right as he might give her the proceeds of such portrait if it had been sold and converted into money.

Mr. Fellows never delivered possession of this portrait to the defendant. It remained in his personal possession for some time after the execution of these deeds, when he gave it to his sister, the plaintiff. It was not such property as he could ever have intended to sell or divert from his family.

The charge of the judge that this picture did not pass by the trust deed, we think correct.

It not within the spirit and intent of said deeds to convey or pass such property any more than it was to sell the watch in his pocket or the coat upon his back.

Judgment affirmed.

Opinion by *E. Darwin Smith, J.*

BANKRUPTCY. JURISDICTION

U. S. SUPREME COURT.

James O'Brien, *plaintiff in error*, v. George M. Weld, Henry W. Nagle, and Edwin Sherwin, *defts in error*.

Decided April 24, 1876.

An assignee in bankruptcy, in order to recover property held under state authority, must do so by a plenary suit; it cannot be done by summary application to a bankrupt court. But where a plaintiff in execution

under which property had been taken makes application to the bankrupt court, by petition, to allow the sheriff to proceed to sale, &c., and obtains the order asked, under which the proceeds are paid into the bankrupt court, he is bound by it.

In error to the Supreme Court of the State of New York.

This is an action brought to recover \$4,404.72 collected by the plaintiff in error as sheriff of the city and county of New York, under three executions, two of which were issued on judgments entered in favor of the defendants against Frederick and Albert Wiltse, jointly and severally, and one of which was issued on a judgment entered in favor of the defendants against Frederick Wiltse alone.

The defence relied upon is that the plaintiff in error, under certain orders made by the United States District Court for the Southern District of New York, in a proceeding in bankruptcy against Frederick Wiltse, paid over to the clerk of that court the moneys arising from the sale of the property levied on by him under said execution.

On the 12th of March, 1870, Frederick Wiltse was thrown into bankruptcy upon the petition of one of his creditors. Prior to this time Weld & Co., the defendants in error, had obtained against the Wiltses the judgments above mentioned, and executions upon the same were in the hands of O'Brien, who was then the sheriff of the city and county of New York.

The petitioning creditor in bankruptcy, on the 24th of March, 1870, obtained from the district court an injunction order directed to Weld & Co. and to the sheriff, O'Brien, restraining them from disposing of Frederick Wiltse's property until the further order of the court. This order was duly

served on Weld & Co. and on the sheriff.

On the 6th day of July, 1870, Weld & Co. presented a petition to the district court asking that the injunction be so modified as to allow the sheriff to sell the property of Frederick Wiltse levied on by the sheriff previously to filing the petition in bankruptcy. On this petition of Weld & Co. an order was made granting its prayer, directing the time and manner of sale, and ordering that after deducting costs and charges, the avails of the sale should be brought into the district court to await its further orders. The order was entered with the clerk of the district court by and upon the motion of the counsel of Weld & Co., and served upon the sheriff.

A sale was made in pursuance thereof, and the money resulting from the sale was paid into court by the sheriff, as therein required. Weld & Co. now sue the sheriff for not paying this money to them, upon their executions, instead of paying it into court. To a plea setting up the facts above stated, a demurrer was interposed by the plaintiffs, which was sustained by the Supreme Court and the Court of Appeals of the State of New York, and judgment rendered against the sheriff.

The writ of error before us is to review that judgment.

In support of this judgment it is contended that the United States District Court is a court of limited jurisdiction; that it has not the power to divest a state court of its jurisdiction; that the title to the property levied on by virtue of the judgment and execution from the state courts was superior to that derived from the orders of the district court; and that the orders directing the payment of the money in

question into the district court were without jurisdiction and void.

It is further contended in support of this judgment that if the bankrupt court had authority to take the custody and control of the property from the state court, it could do so only by a suit at law or in equity, and not by summary proceedings, and that an order made in such summary proceeding is absolutely void.

Held, That the assignee in such case, if he desired to obtain the property held under state authority, must litigate his claim by a plenary suit, either at law or in equity, and that it could not be done by a mere rule.

But as the plaintiff in the execution himself took the proceeding in the bankrupt court, and there obtained rules and orders, he is bound by them. That the plaintiffs in the executions under these facts can maintain a suit against the sheriff for paying the money into court in pursuance of the order obtained by them, instead of paying it to them, is sustained by no authority, and is in violation of the principles of right and justice.

If the execution creditor, upon the claim of the assignee, had simply directed the sheriff, without the form of an order of the court, to pay the money into bankruptcy, the sheriff would have been justified in complying with the direction.

Especially is he bound, when, as in the present case, his direction is clothed with the solemnity of a legal proceeding, and the money is received and distributed under the forms of law.

The judgment must be reversed, and the case remitted to the Supreme Court of New York for further proceedings.

Opinion by *Hunt, J.*

APPROPRIATION OF PAYMENTS.

SUPREME COURT OF PENNSYLVANIA.

Moore v. Kiff, et al.

Decided March 29, 1876.

In the absence of appropriation by the parties, the law applies payments first to the interest, and then to the principal of the debt.

Where a debt is payable in a commodity, a failure to make or offer such payment fixes a liability to pay in money.

Error to Common Pleas of Bradford county.

Scire facias to revive a judgment entered on a bond, brought by Moore against Erastus Kiff, Samuel Kiff, and John Kiff. Defendants pleaded payment with leave.

On June 24, 1846, Moore sold a farm, with the stock thereon, to the defendants, the latter agreeing, by the contract of sale, to give him their joint and several promissory notes for \$3150 with interest from March 4th previous, and to execute a judgment bond conditioned for the payment of the said notes. On the same day the defendants executed ten joint and several judgment notes, payable one each year, amounting in the aggregate to \$3150, without interest, but gave ten other notes for the interest, payable in pork and sugar. A bond with warrant of attorney to confess judgment was also executed for \$3150, conditioned for the payment of the ten principal notes. Two days later judgment was entered upon this in the Common Pleas of Bradford County.

On November 28, 1849, defendants resold the farm to Moore, he agreeing to accept it at the rate of \$5.50 per acre, in part payment of the above notes. On January 8, 1868, Moore brought this *scire facias*.

It appeared from the evidence that the undisputed payments amounted to \$2831. Samuel Kiff had transferred to Moore a farm at a valuation of \$1000, the surplus of which, remaining after payment of his private debts to Moore, was to be applied towards the liquidation of these notes. Defendants claimed that \$910 thereof went toward the notes, \$330 more than Moore allowed. They likewise claimed credit for a payment of \$200 in sugar, thus swelling the payments to \$3371—more than the face of the bond.

No special instructions were requested by the plaintiff.

The court below (*Streeter, P. J.*) charged *inter alia*, as follows: "Erastus Kiff swears that Moore received a farm of \$1000 to apply on these notes, and Samuel Kiff testifies that his private debt was first taken out, but the amount of it he cannot state; he recollected that he owed him \$90 for a horse. The defendants insist that this credit should be \$910 instead of \$570. It is for you to determine under the evidence which is the true amount. * * *

We understood from the evidence that the price of the 350 acres resold to plaintiff, as well as the amount paid by Samuel Kiff, was to apply upon the debt in judgment now sought to be revived. But the counsel for the plaintiff insisted that these payments must be applied to the interest notes first, and the balance to the judgment. No money or sums were ever applied by Moore to either debt; and as the interest notes are now barred by the statute, it seems to us that these payments must be applied to the debt in controversy.

If you find for the plaintiff, it seems to us that the amount should be \$319, with interest from June 24, 1856." To this charge the plaintiff excepted before verdict.

Verdict for the defendant and judgment thereon.

Held, The learned judge erred in instructing the jury that the payment made by the defendants must be applied to the principal of the debt in controversy to the exclusion of the interest notes. He places this upon the ground that the latter were barred by the statute. The error of this reasoning consists in the fact that at the time of the agreement of November 28th, 1849, the interest notes referred to were not barred.

Where money is paid generally upon a debt, the obvious rule is to apply it first to the interest, if any, in arrears, and then to the extinguishment of the principal. The parties evidently contemplated the payment of the debt due Moore, not merely the principal of that debt. Nor is the fact that the interest notes were payable in pork and sugar, material, unless there had been an offer to show payment in those particular commodities. The defendants had a right to pay in pork and sugar. An offer to do so would have been a sufficient answer to a demand for payment. But a failure to show either payment or an offer of payment, in these articles, fixes the liability of the defendants to pay in money.

Judgment reversed and a *venire facias de novo* awarded.

Opinion by *Paxson, J.*

WILL. RESTRAINT OF MARRIAGE.

ENGLISH HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Allen v. Jackson.

Decided December 13, 1875.

A condition in the will in restraint of the second marriage whether a man or a woman is not void.

This was an appeal from a decision of Vice-Chancellor Hall.

Mrs. Frances Jackson, a widow, by her will, dated the 7th of March, 1862, bequeathed the residue of her estate and effects to T. Allen and W. H. Jackson, whom she appointed her executors, upon trust out of the annual income to pay to her niece and adopted daughter, Ellen Ada Jackson, the wife of the defendant, Robert Noble Jackson, the annual sum of £40 for her life for her sole and separate use, and, in the next place, to pay the whole remaining income unto her nephew, the defendant, R. N. Jackson, and the said Ellen Ada Jackson and their assigns during their joint lives, and after the decease of either of them then to the survivor during his or her life for their, his or her own use and benefit. Provided, nevertheless, and she declared her will to be, that if the said Ellen Ada Jackson should depart this life in the lifetime of her husband, the said R. N. Jackson, and he should marry again, then she directed her said trustees and the survivors of them to stand possessed of the said trust property upon the trusts therein after declared. And after the decease of her said niece and her surviving husband, if any, and subject to his marrying a second wife as aforesaid, she directed the said trustees or trustee to stand possessed of the said trust property in trust for the children and grandchildren of her said niece, Ellen Ada Jackson, as therein mentioned, and in default of children or grand children of her said niece, then in trust for the children of the testatrix's sister, Jane McCormick, who should be living at the time of the death of her said niece without issue, in equal shares as tenants in common. The will contained powers of maintenance and advancement for the benefit of the infant children.

By a codicil the testatrix gave Jane McCormick an annuity out of the income of the trust property.

The testatrix died in January, 1863.

Ellen Ada Jackson died in January, 1864, without issue.

In January, 1874, her husband, R. N. Jackson, married again.

The trustees filed the present bill against R. N. Jackson and Mrs. McCormick and her children, praying for execution of the trusts of Mrs. Jackson's will, and for a declaration that R. N. Jackson had forfeited his life interest in the trust property.

The Vice-Chancellor held that the proviso defeating the life estate of the husband on his second marriage was void, and that he was entitled to the income of the property notwithstanding his second marriage.

Mrs. McCormick and her children appealed from this decision.

Held, It is somewhat singular that, although something very like the question involved in this case was decided in the case of *Evans v. Rosser*, yet the exact point itself is now for the first time to be decided.

It seems to have been laid down by a great number of cases that what is called a general restraint upon marriage is against the policy of the law. That, of course, can be the only principle which can be the foundation of any rule at all on the subject. The general restraint of marriage, for some reason or other, probably a good reason, is to be discouraged, and a condition subsequently annexed, by way of forfeiture to a marriage is therefore void. That is the law both as to man and woman; but it has been most distinctly settled that with regard to the second marriage of woman, that law does not apply, that whether the gift be a gift to a widow by a husband or a gift to the

widow by some other person, the law does not apply to that case, and that such a condition is perfectly valid.

Now, there is no act of Parliament which has provided, and there is no decision of any court whatever which has established, that there is any distinction whatever between the second marriage of a woman and the second marriage of a man; and in the absence of any decision to the contrary, we are unable to see any principle whatever upon which the distinction can be drawn between them. The case before us seems to us to show what immense mischief one would be doing if one were to introduce a different rule of law in the case of a widower to that in the case of a widow. Now, in the case of a widow, it has been considered to be very right and proper that a man should prevent his widow from marrying again. Probably, if she were a widow with children, he might think that his children would not be so well cared for and protected if his widow formed a second alliance and became the mother of a second family. That might perhaps have been the origin of the exception, and it was held, when the thing came to be applied, that it might very well apply to a gift by a stranger who was not the husband. Supposing we had the case of a married woman having a property which she had power to dispose of by her will, and she left it to her husband by reason of his being the widower, and for the purpose of enabling him to perform his duties properly as the head of the family which she may have left, it would, it seems to us, be monstrous to say that when she provided for the contingency of the husband marrying a second time and having a new wife and a new family, she should not be able to say, "In that case he is to lose the es-

tate, and it is to go over for the benefit of my children." In this particular case it was not the wife who was doing it, but it was a person who places herself in the position of the wife—the wife's mother—and who says, making a provision for her adopted daughter, that she gives her the income of her property for her life, and then gives it, after her death, to her surviving husband, evidently in his character of widower, with a declaration that if he should marry again it should go over to the child of the daughter who was the first object she intended to provide for—a most reasonable and proper provision, with respect to which it seems impossible to suggest that there is any ground of public policy against it. On that ground simply, that there is no distinction in principle or authority between the second marriage of a man and the second marriage of a woman, we are prepared to say that the law should be the same as to the one as to the other.

We are of opinion that the gift over on the marriage of a widower is exactly on the same footing as a gift over on the marriage of a widow.

The condition is not void.

Opinion by *James, L. J.*; *Mellish, L. J.* and *Baggally, J. A.*

CONTEMPT OF COURT. RECEIVER.

COURT OF COMMON PLEAS OF PENNSYLVANIA.

The Commonwealth *applt.*, v. Edward Young, Sheriff, and others, *respts.*
Decided March 20 1876.

A sheriff who seizes goods in possession of a receiver, after notice of the appointment of the latter by the court, is not protected by the process in his hands, unless it was issu-

ed by leave of the court. His seizure is a contempt of the order of the court, and subjects him and his assistants to punishment and restoration of the property.

Even though the title of a claimant may be paramount to that of a receiver appointed by a court of equity, yet he will be guilty of contempt if he asserts his rights by taking possession, or by instituting an action without leave of the court.

On the 9th day of June last, at the instance of bondholders secured by mortgages, executed by the Hancock Steel and Iron Company, the court appointed B. K. Rhodes, Esq., receiver of the rents and profits of the mortgage estate, consisting of a rolling mill, rolls, machine shop and other property. Owing to embarrassments of the company, and depression in the iron trade, the works were not in operation, but fully equipped for business. There were at the time several rolls for making railroad iron on the premises. Some of them were finished, except the groove which shapes the rails in manufacturing railroad iron; others were in the rough. None of them had been in actual use, but all were made as duplicates to supply the place of those in use, in case of breaks or other necessity for a change.

On the 6th day of January last a writ of replevin was placed in the hands of Sheriff Young, at the suit of Jacob W. Moyer and others, against the receiver. This writ was executed by the sheriff against the protest of the receiver, and six of the nine rolls were taken and carried away as personal property, which had been sold at constable sale to the plaintiffs.

At the February Term a rule was obtained in behalf of the receiver to

show cause why an attachment should not be issued against Sheriff Young and others, parties in the writ, and assistants, for contempt of the court, in bringing an action against the receiver, and interfering with the possession of property in his hands.

Held The possession of a receiver of the property embraced in the order of his appointment is the possession of the court: any attempt to disturb that possession without leave of the court is a contempt of the court.

A sheriff who seizes goods in possession of a receiver, after notice, is not protected by the process in his hands, unless it is issued by leave of the court.

When a party claims title paramount to that of a receiver, he must apply to the court for leave to proceed, to assert his right, notwithstanding the appointment of a receiver.

Where the property is legally in the possession of the receiver, it is the duty of the court to protect such possession, not only against violence, but also against suits at law.

Whereupon it is ordered and adjudged that the defendants pay the costs of this rule. Also, that they return the said property to the premises whence it was taken within five days. When possession is fully restored, the receiver is directed to retire therefrom, in order that the respective claimants may assert their legal rights against each other. It is further ordered that no further proceedings be had in the suit in replevin. Attachments ordered; parties to be released on compliance with this order.

Opinion by *Elwell, P. J.*

RECEIVER OF NATIONAL BANK

N. Y. SUPREME COURT, GENERAL TERM.

FIRST DEPARTMENT.

Ocean National Bank, *respt.*, v. Selah C. Carll, *applt.*

Decided March 31, 1876.

The Supreme Court has no jurisdiction to direct a receiver appointed under Section 50 of the National Currency act, who is not a party to the record, to pay over moneys in his hands to a judgment creditor of the bank over which he is appointed receiver.

Such receiver being under the control of the Comptroller of the Currency, such judgment creditor should present his claim to the Comptroller of the Currency for payment.

Appeal from order of Special Term denying defendant's motion that the receiver of the Ocean National Bank, (the plaintiff,) pay out of the money in his hands the judgment in favor of the defendants for costs in this action.

The action was commenced in this Court by the Ocean National Bank, in December, 1870, and has been continued in the name of such bank. On the second trial thereof, which took place December 24th, 1874, the plaintiff's complaint was dismissed with costs, and judgment was entered against the Ocean National Bank for such costs.

On the 15th of December, 1871, Theodore M. Davis was appointed by the Comptroller of the Currency, under section 50 of the National Banking Act, receiver of said bank, and under that appointment took possession of the assets of the bank, and had in his hands money sufficient to satisfy the judgment. The bank is insolvent. Prior to making this motion, the defendant's attorney requested the receiver to pay the judgment, which he refused to do. The motion was denied.

Dunning, Edsall & Hunt for *respt.*
Nelson Smith for *applt.*

Held, The receiver was not an officer of this or of any other court. He was appointed by the Comptroller of the Currency under section 50 of the National Currency Act, and as such was the agent or officer of the Comptroller, clothed with the powers and duties specially conferred by the act of Congress.

It seems to us very clear, under the provisions of the act referred to, that no order can be made by this court directing the receiver to pay the costs of the judgment against the bank; first, because the court has not jurisdiction of the receiver in a case in which he has not been made a party to the record, to make such an order; secondly, because the receiver has no power to pay out the moneys collected by him for the purpose of extinguishing the judgment, inasmuch as his duty is to pay the same into the treasury of the United States, subject to the order of the Comptroller. The demand upon him is therefore nugatory.

The defendant should have presented his claim to the Comptroller of the Currency for payment out of the proceeds received by him.

We do not intend, in deciding the motion, to determine what power the courts may possess if the receiver had brought the action, or had been made a party to the record and prosecuted the same after his appointment in his own name as such receiver.

The only question now determined is that upon the state of facts presented upon the motion, the defendant was not entitled to the order sought for.

The order must be affirmed with \$10 costs and disbursements.

Opinion by *Davis, P. J.*; *Daniels and Brady, J. J.*, concurring.

NEW YORK WEEKLY DIGEST.

Vol. 2.] MONDAY MAY 15, 1876. [No. 14.

MUNICIPAL CONTRACTS. NON-APPROPRIATION. IMPLIED OBLIGATION.

N. Y. COURT OF APPEALS.

Nelson, *applt.*, v The Mayor, &c., of New York, *respt.*

Decided January, 1876.

In an action against the City of New York to recover the contract price of material actually delivered to and used by the defendant, for the construction of sewers, which contract was made with the Commissioners of Public Works, in April, 1871, it is no defence that there was no ordinance of the common council authorizing the contract, or other proof that the commissioner was authorized by defendant to make the contract.

That although the contract was illegal by reason of creating an indebtedness beyond what was authorized by law, it was competent for the legislature to legalize it, and it has been so legalized.

It seems that in case such a contract is illegal, that the contractor is not without his remedy, where the city has received and used the property. In such a case there is, independent of the contract, an implied obligation to pay its value.

This action was brought to recover a balance due on a contract for furnishing sewer drain-pipes, &c.

The contract was made April 29, 1871, between plaintiff and the commissioner of public works, acting for the defendant. The materials were furnished pursuant to the contract, and accepted and used by defendant to the amount of \$181,835, and the necessary certificates to entitle plaintiff to payment for \$127,284 had been given and \$51,550 remained due and unpaid.

The defendants alleged:

1. That there was no ordinance of the common council authorizing the contract, or other proof that defendant ever authorized the commissioner of public works to make the contract.

2. That it was not shown that any appropriation had been previously made covering the expenses contemplated by the contract.

Upon these two grounds the court, at the trial, dismissed the complaint.

Held (as to the first objection), That as chapter 381, Laws of 1865, as amended by chapter 551, Laws of 1866, conferred directly upon the Croton Aqueduct Board the power to contract in pursuance of law for such materials used in the construction of sewers, and in such quantities as they might deem proper, and no action of the common council was required; and as this power was, by the charter of 1870, transferred to the commissioner of public works, the objection was not available; that the expression "contract in pursuance of law" does not refer to any action of the common council, but to the manner of making the contract, which was provided for by section 3, of chapter 381, Laws of 1865.

As to the second ground of non-suit,

Held, That as under the provision of the charter of 1857, (chap. 446, Laws of 1857) which was in force when the Act of 1866 was passed, no expense could be incurred unless there was an appropriation previously made covering it, which provision was re-enacted in the charter of 1870, and was repeated in the amendments of 1871 (§ 101, chap. 574, Laws of 1871), which latter act was in force at the time the contract in question was executed, and as by said act of 1866 the issue of bonds for the purposes of the act was restricted to \$100,000, the con-

tract purported to create an indebtedness beyond what was authorized by law, and was invalid. But that, although when the contract was made it was illegal, because the expense incurred was in excess of the appropriation, it was within the power of the legislature subsequently to validate it, and that this was done by the act of 1872 (§ 8, chap. 872), authorizing the comptroller, in addition the amounts authorized by then existing laws to issue bonds to the amount of \$100,000 annually, to be applied to the payment of "expenses incurred in the construction of sewers already built," &c., and to reimburse advances made under the said acts of 1865 and 1866; and as before the commencement of the action the comptroller had been authorized to issue bonds to more than the amount necessary to pay plaintiff's claim, he had a right to maintain his action.

It seems, also, that it does not follow that because such a contract was illegal that the contractor is without remedy, when the city has received and used the property obtained under it. In such case, independent of the contract, there is an implied obligation to pay the value of the property.

Judgment of General Term affirming a dismissal of the complaint at Circuit reversed, and new trial granted.

Opinion by *Rapallo, J.*

RECEIVER.

ENGLISH HIGH COURT OF JUSTICE.
CHANCERY DIVISION.

Edwards v. Edwards.

Decided December 16, 1875.

Where, on motion for a receiver, an order is made that a named person on giving security be appointed re-

ceiver, the appointment takes effect from the date of the order; and therefore where, after such an order, and before the receiver so appointed perfected his securities, certain execution creditors who had not received notice of the appointment put the sheriff in possession of the goods over which the receiver was appointed:

Held, That immediately on notice being given of the appointment the sheriff ought to have been withdrawn.

This suit was instituted by bill filed on the 26th of July, 1875, for the purpose of realizing a security consisting in part of an unregistered bill of sale of the trade effects of a printing business.

The plaintiffs were the acting executors under the will, dated the 31st of January, 1870, of Frederick Howarth Edwards, who died on the 17th of December, 1872.

The testator, by a deed of the 1st of July, 1869, sold the business to the defendant for £8,000, together with his interest in the leasehold premises where it was carried on, and the stock-in-trade and effects of the concern; and it was provided that £500 only of the purchase money should be paid in cash, the rest, with interest, remaining a charge upon the property. By another deed of the same date a debt of £6,500 also owing by the defendant was made a charge upon the property. Neither of these deeds was registered under the bill of Sale Act.

Default was made in payment of the interest on these sums, the bill was filed, and on the 29th of July, 1875, the plaintiffs, on an affidavit of service of notice, obtained an order which was partly as follows:

"This court doth order that Charles Edward Mason, of No. 30, Essex street, Strand, in the county of Middlesex, public accountant, upon his giving

security, be appointed to receive the rents and profits of the leasehold hereditaments in the bill mentioned, and to collect and get in the debts now due and outstanding, and other assets, property, and effects belonging to the business in the bill mentioned, and to manage and carry on the said business, and the tenants of the said leasehold premises are to attorn and pay their rents in arrear and growing rents to such receiver.

"And it is ordered that the plaintiffs and the defendant do deliver over to the said Charles Edward Mason all the stock-in-trade and effects of the said business, and also all securities in their or either of their hands for such outstanding estate, and all books and papers relating thereto.

And it is ordered that the said Chas. Edward Mason do, out of the first moneys to be received in respect of the said rents and debts and effects, pay the ground or other rents and debts due and to become due in respect of the said business."

For twelve months before the institution of the suit C. E. Mason had superintended the business on behalf of the plaintiffs and other creditors, and was accustomed to attend at the business premises for a short time on most days. The defendant, however, continued ostensibly to carry on the business, and the same course was pursued after the order of the 29th of July, 1875, and no step was taken to give notice to the public or persons dealing with the defendant of the appointment of the receiver.

On the 4th of August, 1875, the sheriff of Middlesex, under a writ of *fi. fa.* issued an action against the defendant by Francis Lesiter Soper and

Reeves Lovell for a debt of £419 5s. 3d., seized the stock in trade and business effects and thereupon the receiver instructed his solicitor to give notice of his claim to the goods to the attorneys of the plaintiffs in the action, which was done on the following day.

An interpleader summons was then taken out by the sheriff, at the hearing of which Cleasby, B., barred the claim of the receiver without prejudice to any application to the court, on the ground that the claim was an equitable one.

The sheriff remained in possession till the 23d of August, when he advertised the property for sale. The plaintiffs thereupon, on the 25th of August, applied to the vacation judge *ex parte*, and obtained an order restraining the sale extending over the 1st of September, and on the 14th of September the vacation judge made a further order in the presence of all parties directing the sheriff to withdraw, on an undertaking by the plaintiffs and the receiver to deal with property under the direction of the court.

The receiver completed his securities on the 25th of August, and this fact was certified by the chief clerk on the 3d of September.

The execution creditors now moved that the receiver should be ordered to pay their debt, interest, and costs, out of the moneys of the plaintiffs or the defendant in his hands; or in the alternative, that they might be at liberty to enforce their judgment in the action against the defendant, and that the sheriff might be at liberty to execute the writ of *fi. fa.* against the defendant in due course of law, without regard to the plaintiff's mortgages in the bill mentioned; or, as a third alternative, that the execution creditors might

be at liberty to go in and be examined *pro interesse suo*, and that inquiry might be made what interest they had in the goods, chattels, debts, credits, rents and profits mentioned in the order of the 29th of July.

Held, For the purpose of taking possession and protecting the business against creditors generally, I think the receiver was in possession, and it was wrong to disturb him; and when the sheriff was informed of the appointment on the 5th of August he ought to have been withdrawn.

I am of opinion that when an individual is named in the order he is entitled to possession as from the date of the order, and is the officer of the court from that time.

I consider Mason as being in possession from the date of his appointment, and the case of the execution creditors consequently fails, and, as they might have come to the court instead of taking out the interpleader summons, they must pay the costs.

Opinion by *Malins, V. C.*

TERMINATING CREDIT. COMPLAINT.

GEN'L TERM. SUPREME COURT, FIRST DEPT.

Claffin et al, *applts.* v. Taussig et al, *respts.*

Decided March 31, 1876.

Where sale is influenced by fraudulent representations, even though on credit, it is unnecessary to allege fraud in complaint.

Seller may terminate the credit and sue on the debt at once.

Appeal from judgment rendered at circuit.

During the years 1873 & '74, plaintiffs sold goods to defendants on credit, re-

lying upon defendants' representations that they had an ample capital, unimpaired. At the expiration of the credit defendants sought an extension, and offered their notes at thirty, sixty, and ninety days, renewing their representations as to unimpaired capital. On the strength of these representations plaintiffs gave the extension and took the notes. The first note was paid, but before the maturity of the second, plaintiffs received notice to attend a meeting of defendants' creditors at which they were offered forty cents in composition of the indebtedness.

Plaintiffs declined the offer and brought immediate suit, and obtained an order for defendants' arrest, because of fraud. On the trial the two remaining notes were surrendered up for cancellation, and the papers on which the order of arrest had been granted were put in evidence. Plaintiff's then offered to show that the notes had been taken upon fraudulent representations as to defendants' solvency, but the offer was refused on the ground that there was no allegation of fraud in the complaint. Complaint was dismissed except as to amount of certain goods sold after the notes were given.

On appeal.

Wm. T. McRae for applts.

Blumenstiel & Archer for respts.

Held, That the ruling thus made was erroneous. The agreement to extend credit, like any other agreement could when presented as a defence, be assailed for fraud.

Plaintiffs were not bound to anticipate the answer that the notes were not due, by averring that they were accepted by reason of fraudulent representations. It is well settled that, when a sale is influenced by fraudulent rep-

representations, even if marked by a credit which has not expired, it is unnecessary to allege fraud in the complaint (27 Barb., 652; 34 id., 89; 32 id., 322; 4 Keyes, 120). The presence of that element destroys the credit at the option of the seller, makes the debt due immediately if he so elect, and enables him to sue at once for its recovery upon an allegation of goods sold and delivered.

And when the defense disclosed the agreement to extend, plaintiffs were not bound by the rules of pleading to give notice that they would assail it on the trial.

It was the defendants' business to be prepared to sustain the agreement, if necessary, by evidence showing its binding force.

Judgment reversed and new trial ordered.

Opinion by *Brady, J.; Davis, P. J., and Daniels, J.* concurring.

INJUNCTION AGAINST COLLECTION OF TAXES. EQUITY TAXATION. CORPORATION.

U. S. SUPREME COURT.

Isaac Taylor, Collector of Peoria county, et al., *appls.*, v. James F. Secor and William Tracy, *respts.*

Decided April 24, 1876.

Neither illegality or irregularity in the proceedings, nor error, or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after its payment, will authorize an injunction restraining the collection of a tax.

The rule as to courts of equity interfering with the collection of taxes stated and applied to a peculiar case.

Appeal from the Circuit Court of the

United States for the Northern District of Illinois.

This was a bill in equity seeking to restrain the collection of certain taxes upon the ground of illegality, erroneous assessments, inequity, and that the law was unconstitutional.

The act of the legislature of Illinois of March 30, 1872, under which the taxes complained of were assessed, makes special provisions for the taxation of railroads and other corporations, the main feature of which is the purpose of leaving to each county, city, and town the power of assessing for taxation what is properly local in the same manner that other similar property is taxed in that municipality, and at the same time to subject to like taxation on some fair basis that which is not in its nature so clearly local, but which, by reason of its being appurtenant or incident to the railroad, should pay its share to the state, and to all the counties, towns, and cities through which any part of the road runs. The theory of the system is manifestly to treat the railroad track, its rolling stock, its franchise, and its capital as a unit for taxation, and to distribute the assessed value of this unit according as the length of the road in each county, city, and town bears to the whole length of the road.

It provides, therefore, for three separate valuations:

1. Of the real estate in each county, city, and town, which is not a part of the track and right of way, and of the personal property, such as tools, implements, &c., which remain permanently at that locality. These are valued by the local assessor and taxed by the local authorities in precisely the same manner that other real and personal property are assessed and taxed.

2. The railroad track, including the right of way, the grading and superstructure, and such depots, buildings, and other improvements as are on it, and all the rolling stock and other personal property not local.

The entire value of this, owned by any company in the state, is ascertained by a report made by the proper officer of the railroad company, submitted to a state board of equalization, which fixes this value finally, and each county, city, and town taxes the company on so much of this assessment as the length of the track within that locality bears to the whole length of the track assessed by the board.

These two subjects of assessment are by the statute called the tangible property of the company.

It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible or tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has a right to subject to taxation.

3. This element the State of Illinois calls the value of the franchise and capital stock of the corporations. The value of the right to use this tangible property in a special manner for purposes of gain. And this constitutes the third valuation, which is likewise to be made by the board of equalization, and which, when thus ascertained, is subjected to the taxation of the state, and the counties, towns, and cities, by the same rule that the value of the road-bed is, namely, according to the length of the track in each taxing locality. The word capital stock, as here used, does not mean the shares of the stock, but

the aggregate capital of the company. This is obvious from the proviso to the fourth paragraph of section three of the revenue law. As this paragraph lies at the basis of these controversies, it is here given verbatim:

"The capital stock of all companies and associations now or hereafter created under the laws of this state, shall be so valued by the state board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just; and such rules and principles when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act—subject, however, to such change, alteration, or amendment as may be found, from time to time, to be necessary, by said board: Provided, that in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this state. This clause shall not apply to the capital stock or shares of capital stock of banks organized under the general banking laws of this state."

The rule adopted by the board is as follows:

"*First.* The market or fair cash value of the shares of capital stock and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses) shall be combined or added together; and the aggregate amount so

stock, including the franchise, respectively, of such companies and associations.

"*Second.* From the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations, (such equalized or assessed valuation being taken in each case, as the same may be determined by the equalization or assessment of property by this board), and the amount remaining, in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this state."

It is said that the statute of Illinois is void, because it violates the principle of uniformity, and taxes corporations in a manner different from that which governs taxation of individuals.

The sections of the constitution relied on in support of this proposition, are sections one and ten of article nine, which are as follows:

§ 1. The general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property; such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor dealers, toll-bridges,

ferries, insurance, telegraph and express interests or business, venders of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

"§ 10. The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property for corporate purposes, but shall require that all taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under the authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

As regards this latter section there is no claim that *the rate* of taxation levied by any municipal corporation, on the assessed value of railroad property within its limits, is greater than on other property.

Nor is it asserted that the valuation of that part of the property which the statute regards as strictly local, namely, real estate not a part of the track, and tools and implements used exclusively within the locality, has been assessed on any other principle than that which is applied to the property of individuals.

But the contention is that the rule of treating the road, its rolling stock and franchises as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits, violates the principle of this section. The Supreme Court of Illinois have held this statute to be constitutional.

The statute requires the proper officers of the railroad companies to furn-

ish to the state auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the auditor, without notice to the companies, and without sufficient notice that it ought to be done, and it is strenuously urged that for want of this notice the whole assessment of the property and levy of taxes is void.

Held, 1. While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or the injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection.

2. This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make nor cause to be made a new assessment if the one complained of be erroneous, and also in the necessity that the taxes, without which the state could not exist, should be regularly and promptly paid into its treasury.

3. *Quære*: Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes as that here applied to state taxes? Probably not.

4. No injunction, preliminary or

final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, has been paid or tendered without demanding a receipt in full.

5. While the constitution of Illinois requires taxation, in general, to be uniform and equal, it declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, *uniform as to the class upon which it operates*, and under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroad companies from that for individuals.

6. Nor does it violate any provision of the constitution of the United States.

7. The capital stock, franchises, and all the real and personal property of corporations are justly liable to taxation, and a rule which ascertains the value of all this by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of the assessment, is probably as fair as any other.

8. Deducting from this the assessed value of all the tangible real and personal property which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other manner, all modes being more or less imperfect.

9. It is neither in conflict with the constitution of Illinois nor inequitable that the entire taxable property of the railroad company should be ascertained by the state board of equalization, and that the state, county, and city taxes should be collected within each municipi-

pality on this assessment, in the proportion which the length of the road within such municipality, bears to the whole length of the road within the state.

10. The action of the board of equalization in increasing the assessed value of the property of a railroad company or an individual, above the return made to the board, does not require a notice to the party to make it valid, and the courts cannot substitute their judgment as to such valuation for that of the board.

11. The Supreme Court of the State of Illinois having decided that the law complained of in these cases is valid under her constitution, and having construed the statute, this court adopts the decision of that court as a rule to be followed in the federal courts.

Decree reversed and case remanded to the Circuit Court, with directions to dissolve the injunction and to dismiss the bill.

Opinion by *Miller, J.*

NEW YORK BOARD OF UNDERWRITERS. MANDAMUS.

N. Y. SUPREME COURT—GEN'L TERM,
FIRST DEP'T.

People *ex rel.*, James H. Pinckney and The Relief Fire Insurance Company, *appls.* v. New York Board of Fire Underwriters., *respts.*

Decided May 5, 1876.

Members of a corporation having no proprietary interest in its capital, may be expelled therefrom for a violation of its by-laws.

Appeal from an order denying motion for writ of mandamus.

The New York Board of Underwriters was incorporated by chap. 846 laws of 1867, "for inculcating just and equitable principles in the business of

insurance, to establish and maintain uniformity among its members in policies or contracts of insurance, and acquire, preserve, and disseminate valuable information relative to the business in which they are engaged." It was empowered "to make all needful by-laws not contrary to the provisions of the act, or to the Constitution and laws of this state or the United States." Among other by laws one was adopted providing that the board might establish and alter the rates of premiums for insurance by a majority vote.

The Relief Fire Insurance Company, of which Jas. H. Pinkney is the president, subscribed to the charter and by-laws, and agreed to be governed and to maintain the rates, rules, &c., of the board, but, afterwards violated the rules by insuring two steamers below the board-rates. For this, after a proper investigation, it was expelled the board.

The board owned no property other than what was necessary for carrying out the purposes of its incorporation, the necessary funds being raised by assessment upon its members. It issued no stock and declared no dividends.

The members, individually, owned no part or interest in the property acquired and had no participation in the earnings.

The relator sought to compel the board to receive it back by a writ of mandamus, but its application was denied by the court below.

On appeal.

Jno. E. Parsons, for *appls.*

Wm. A. Butler, for *respts.*

Held, That the board was not a corporation whose members could resist expulsion on the ground of a proprietary interest in its capital or earnings, no such interest belonging to any of them.

It was organized merely to promote the proper management of insurance business by its members, and in a uniform manner.

Its usefulness depended largely on their faithful observance of its regulations, and it necessarily possessed the power to expel members who violated their obligations in that respect; for, if they might violate its rules and still maintain their membership, its usefulness would be defeated—its very existence destroyed.

There is a tacit condition annexed to the franchise of a member that he will not oppose or injure the interests of the corporate body, which, if he breaks, he may be disfranchised.

The leading purpose of defendant was to secure uniformity in all substantial respects in the policies of its members. The rates of premiums being an important feature both of the business and the policy, uniformity could only be gained by declaring its rates.

The by-laws enacted to secure this end were reasonable, were necessary to the welfare of the board, contained nothing in conflict with its charter or the Constitution of the State, or United States.

Relator having violated these by-laws could properly be expelled.

Order appealed from affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

TROVER.

N. Y. COURT OF APPEALS.

Voltz, resp., v. *Blackmar, applt.*

Decided March 21, 1876.

Trover does not lie to recover chattels from the owner who has violently and forcibly retaken them from the plaintiff, although the latter held them under a claim of ownership.

This action was brought to recover damages for the conversion of a certificate of deposit for \$4,000. Plaintiff had been the defendant's clerk, with power of attorney to draw checks for him. Plaintiff drew a check on defendant's bank account for \$4,000, which included a debt due him from defendant of \$3,000, borrowed money, for which he held defendant's note, and the balance was for salary due and unpaid and included a month's salary in advance. Plaintiff deposited the \$4,000 to his own account, and received a certificate of deposit for it. This certificate was in plaintiff's possession when, as the court below found, defendant by force and violence took it from him, plaintiff having previously endorsed the \$3,000 note as paid, and passed it over the desk to defendant, who said he did not want it, and laid it upon the desk. Plaintiff said, "Pass it back to me and I will retain it with the rest of my vouchers." This defendant did not do, but he did not refuse to allow plaintiff to take it, or claim any right to retain it. The note remained on the desk several days, and was then put in the safe by defendant's clerk. Defendant had just before the above transaction denounced the plaintiff's act in drawing the money, as having done it without right, and demanded that he should return it.

Asher P. Nichols for resp.

Wm. H. Gurney and *John T. Hoffman* for resp.

Held, That the action for conversion could not be maintained; that plaintiff having drawn the check without authority, the money received on it belonged to his principal, as did also the certificate of deposit which represented it, and the rights of the parties were not changed by the deposit of it to

plaintiff's credit; that the taking of the certificate by force from plaintiff did not give him any right of action against defendant to recover the money specified in it; that the retention of the \$3,000 note by defendant, under the circumstances proved, cannot be regarded as a ratification or consent by him that plaintiff should retain sufficient of the money drawn from the bank to pay it, and no inference could be drawn that defendant intended to ratify the drawing of the check, or that he accepted and retained the note as paid.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Andrews, J.*

REFORMATION OF CONTRACT.

NEW YORK COURT OF APPEALS.

Meade, et al., appls., v. Westchester Fire Insurance Company.

Decided March 21, 1876.

To justify the reformation of an instrument, except in case of fraud, it must be established beyond doubt, by the proof, that the parties agreed to something different from what is expressed.

This action was brought to reform a policy of insurance, issued July 1, 1871, to one F., by D., an agent of defendant. It appeared that prior to April, 1871, F. had occupied a dwelling house, and D. had insured the furniture in it. F. owned the adjoining building, and D. had insured that. He had a description of both buildings on his books. The dwelling house was described as a "two-story framed dwelling house, situate," &c., and the adjoining building as a "two and a half story frame building and the addition attached, occupied as a dwelling and paint shop, with stable in the base-

ment," the rate on which was 2 1-2 per cent., that upon the dwelling adjoining being 1 1-2 per cent. In April, 1871, F. removed from the dwelling he had been occupying to the two and a half story building adjoining. F. wrote to D., "I would like you to make out a policy of \$800 on my house," &c. D. issued a policy, describing the property as his two-story frame dwelling, situate," &c., and charged 1 1-2 per cent. premium. The premises occupied by F. were destroyed by fire, and this action was brought by plaintiffs, to whom the loss was made payable. D. testified, on his direct examination, that he supposed F.'s letter referred to property that had since been burned, and which was described in his book; but upon his cross-examination, being asked whether when the policy was issued he supposed the applicant referred to the building he formerly occupied, he answered, "I was in doubt." The simple question was, if it was on the building in which he lived it was 2 1-2 per cent., and if on the one he formerly occupied, 1 1-2 per cent. He was then asked, "You issued it for 1 1-2—which was it on?" and answered, "My idea was, it was on the one formerly occupied."

C. F. Brown for appls.

Calvin Frost for resp.

Held, That the policy could not be reformed; that there was not sufficient proof that the minds of the parties had met.

To justify a court in changing the language of an instrument sought to be reformed, except in case of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof on this point should be so clear

and convincing that there can be no room for doubt.

Order of General Term, reversing judgment for plaintiff, on report of referee, affirmed.

Opinion by *Rapallo, J.*

ATTORNEY'S LIEN FOR COSTS. LIMITATIONS.

N. Y. SUPREME COURT—GEN'L TERM.
SECOND DEPARTMENT.

Charles O. Richardson, *respt.*, v. The
B. & N. Railroad Company, *applt.*

Decided February Term, 1876.

The court will extend its aid to an attorney, to prevent his being defrauded by any collusive action between the parties to a suit out of his compensation, but he is called upon to seek the aid of the court with diligence; and an unreasonable delay and laches on his part will be as fatal to his claim as it would be to the claim of any other suitor.

Proceedings by an attorney to enforce his claim do not constitute an action within the literal operation of the statute of limitations, but in enforcing it the court will be governed by the analogy of the statute.

Appeal from an order granting a motion on the part of C. B. Wheeler, formerly plaintiff's attorney, to establish a lien upon the judgments in this action, and directing the record of satisfaction of the judgments to be vacated, and giving the said Wheeler leave to issue an execution for \$479.30.

This appeal is from an order made at a special term, on the 17th of May, 1875, vacating a satisfaction-piece of the judgment in this action, and authorizing Clark B. Wheeler, Esq., formerly the attorney for the plaintiff, to issue an execution upon the said judgment against the defendant for the sum \$479.30, with interest. The action was

commenced in 1861, by Mr. Wheeler as the plaintiff's attorney, and judgment was entered against the defendant in March 1862, for \$1,377.24, which amount included the sum of \$117.51 costs and extra allowance. In July, 1862, the plaintiff assigned the judgment to John C. Barnes. In October, 1862, Mr. Wheeler informed the assignee, by letter, that he, Wheeler, should decline doing anything more in the suit until he was paid, and stating that he should allow the defendant to proceed and take a new trial and dismissal of the action. Prior to the 9th of December, 1862, the judgment was further assigned to William Cutter. On the 10th of December, 1862, on a motion in behalf of Cutter, the assignee, the special term ordered a reference to George G. Reynolds, Esq., to ascertain and report to the court the taxable costs due to Mr. Wheeler, and that on the payment of such costs by Cutter, Mr. Hitchcock be substituted as the attorney for the plaintiff, and that Wheeler deliver to said Hitchcock the papers in the action. On the 26th day of January, 1863, this order was amended by requiring the referee to report separately the lien or right of said Wheeler, if he has any beyond the taxable costs referred to, as against the assignee of the judgment, without prejudice to the further lien of said Wheeler, if he has any. In March, 1863, on motion of Mr. Hitchcock, as attorney for Cutter, the order was again amended by striking out the words requiring the referee to report the amount of Wheeler's lien, if any, beyond the taxable costs. Mr. Wheeler appealed from the order, as thus modified, to the general term, and the order was affirmed in May, 1863. The referee, Reynolds,

reported as remaining unpaid to Mr. Wheeler the sum of fifty-three dollars and fifty-nine cents. Mr. Wheeler filed exceptions to this report, which exceptions were overruled and the report confirmed. From the order overruling the exceptions and confirming the report Mr. Wheeler appealed; but the papers do not show that any disposition has ever been made of the appeal. The next movement on the part of Mr. Wheeler, so far as the papers disclose, is an application to the special term in Kings county, for an order, which was granted on the 4th day of October, 1869, whereby it was referred to John P. Rolfe, Esq., to take proof of the nature, extent and value of Mr. Wheeler's professional services, the nature and extent of his lien upon the judgment for such services and for the expenses and disbursements incurred by him, and what he has become liable to pay to associate counsel, employed by him at the request of the plaintiff, to the end that, upon the coming in and filing of said report, the defendants shall pay the amount reported due, with costs of the motion and the expense of the reference, and the order expressly reserved the question whether Wheeler had any lien at all. It does not appear that any further proceedings were had until January 1875, when an order was made by the special Term, on a motion in behalf of Mr. Wheeler, that Mr. Greenwold be substituted as the referee in place of Mr. Rolfe. It would seem, though the fact does not very distinctly appear, that Mr. Wheeler at some time received the amount reported by Mr. Reynolds.

On the 3d of April, 1875, Mr. Greenwold reported to the court that he had taken proof, etc., as directed by the order of reference, and reports the same,

but without reporting any amount due to Mr. Wheeler, or the nature and extent of his lien.

The order appealed from, made at special term, May 7, 1875, orders that Mr. Wheeler have leave to enforce his lien for \$419.70, with certain costs and expenses, amounting in all to \$479.30, and vacating and setting aside the satisfaction of the judgment, and giving Wheeler the power to issue execution on the judgment against the defendant for \$479.30, with interest from the date of the order.

Dudley Field, for the applt.

S. D. Lewis, for Wheeler.

Held, There appears to have been the most extraordinary delay and laches on the part of Mr. Wheeler in prosecuting this claim for compensation in excess of the taxable costs, in this case. If the question of Mr. Wheeler's compensation beyond the taxable costs was embraced in the order of reference to Mr. Reynolds, it is still pending, so far as the papers show, on the appeal from the order confirming the report of Mr. Reynolds. If it was not embraced in that reference then it was intended to be embraced in the reference to Mr. Rolfe of the 4th day of October, 1869, more than six years after the last modification of the order of reference to Reynolds; and the order of reference to Rolfe was suffered to remain unexecuted, and without any movement, on the part of Mr. Wheeler, to cause the same to be executed for nearly five years more. The court will extend its aid to an attorney to prevent his being defrauded by any collusive action between the parties out of his reasonable compensation, but he is called upon to invoke the aid of the court with due diligence, and great and unreasonable delay and laches on his part in assert-

ing his rights should be at least as fatal to his claim as to that of any ordinary suitor. But in the enforcing of remedies of this character, depending upon the equitable powers of the court, and, to a certain extent upon its discretion, it will, in general, be governed by the analogy of the statute of limitations, and certainly ought not to encourage the extraordinary laches which has been manifested in this case.

Order appealed from reversed, with costs and disbursements to appellant.

Opinion by *Talcott, J.; Barnard, P. J.*, concurring.

EVIDENCE. LEASE.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Richards, respt. v. Carlton, applt.

Decided March 31, 1876.

In an action on a lease, when eviction is set up as a defence, evidence tending to show that the act constituting the eviction was done by the lessor, and not a third party, admissible.

Appeal from a judgment rendered on the verdict of a jury.

In August, 1869, plaintiff rented the whole of a certain house of one Pike, except a store in the front basement, which was reserved to said Pike. Plaintiff wrote upon the lease an agreement to let such tenants as might thereafter rent the store have free passage through the dwelling part of the house to the water closet in the rear.

In October, 1869, plaintiff rented the same premises to defendant (the store reserved as before,) but with no agreement as to right of way to the water closet. Thereafter, certain parties rented the store of Pike, who, under plaintiff's agreement, insisted upon and exercised the right of access to the water closet.

Defendant claimed that this was such an infringement upon her right of exclusive enjoyment and occupation of the dwelling portion of the building, as to amount to a constructive eviction. She therefore surrendered the premises and refused to pay rent.

On the trial defendant, in order to sustain her position, sought to introduce plaintiff's agreement with Pike which was excluded.

Verdict for plaintiff.

On appeal.

W. W. Niles for resp.

B. G. Hichings for applt.

Held, That the exclusion of plaintiff's agreement as to the passage-way destroyed the foundation of the defence, and no other valid reason being shown to the contrary, the result was a verdict against the defendant.

It was necessary, in order to establish a violation of the covenant as to quiet enjoyment, for defendant to show that the act by which it was accomplished was that of her lessor, the plaintiff, and not a mere third party; that act was an agreement by which a part of the demise was granted to another by a prior agreement of her lessor.

Exactly what the offered evidence would have demonstrated does not appear, owing to its exclusion; but judging from the offer, it would seem to have been possible for defendant to have made out her case. No reason is given for this exclusion, and none is apparent.

Judgment should therefore be reversed and a new trial ordered.

Opinion by *Brady, J.; Davis P. J.* and *Daniels, J.*, concurring.

USURY.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

The Real Estate Trust Company,
respt. v. Thomas Keech, applt.
 Decided May 4, 1876.

An usurious agreement to extend the payment of a debt does not vitiate the debt or its securities; the agreement alone is void.

The amount paid as consideration for such an agreement should be applied as part payment on the original debt.

Appeal from judgment recovered in an action to foreclose a mortgage.

Defendant, in May, 1871, executed a purchase money mortgage to one Jno. Congdon for \$19,000.

In January, 1872, Congdon assigned it to the plaintiff. In November of 1872, defendant entered into an agreement with the president of plaintiff, by which, in consideration of \$1,000, he agreed that the payment of the debt should be extended six months. The amount agreed upon was paid, and the time accordingly extended.

Defendant seeks to defend the action to foreclose the mortgage, on the ground that the agreement was usurious, and therefore the securities given for the original debt were void.

Wm. A. Boyd, for applt.

Julien T. Davis, for respt.

On appeal

Held, That the original debt being void, it was not affected by the usurious agreement made for the mere extension of the time for its payment.

The usury simply rendered the agreement of forbearance invalid, without avoiding the debt or its securities. The only effect of the agreement, and the \$1,000 paid, or its consideration, was to create an equitable right in favor of the defendant to have that amount applied as a part payment on the mortgage debt. On the facts alleged and proved, such an application should have been made in this case. The right to

it is not dependent upon the statutory provision which allows the recovery of usurious premiums by the debtor only, if sued for in one year.

Judgment should be reduced in its amount by deducting the \$1,000 and interest, and as so modified, should be affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

MECHANICS' LIEN. PUBLIC PROPERTY.

N. Y. SUPREME COURT. GEN'L TERM,
 SECOND DEPARTMENT.

John Leonard, *applt.*, v. Thomas Reynolds and the city of Brooklyn, impleaded, etc., *respts.*

Decided February Term, 1876.

Property held by the public for specific public uses, is held in trust for government purposes, and cannot be taken by an individual for the satisfaction of his private claim.

Appeal from an order of the special term, sustaining a demurrer to the complaint.

The plaintiff was a sub-contractor, under Thomas Reynolds, for labor and materials furnished in the erection of a certain "fire bell tower," in the city of Brooklyn, for the erection of which the city had contracted with Reynolds.

The proceeding is under the mechanics' lien law. The complaint avers that the tower in question is owned and held and used by the city for public purposes. The complaint seeks to establish and enforce a lien on said bell tower. The city of Brooklyn demurred to the complaint. The demurrer was sustained at the special term, and this appeal is from the order sustaining the demurrer.

James Troy, for the applt. .

Jno. H. Knaebel and Wm. T. De Witt, for the respts.

Held, The property held by a municipality, which is a branch of the government, for specific public uses, is held in trust for governmental purposes, and cannot be permitted to be taken by an individual for the satisfaction of his private claim, without interfering with the discharge of the duties of the government, and the performance of its public functions. Such interference can not be permitted under color of general laws, intended to secure the application of the property of a debtor to the satisfaction of the claims of creditors.

The order of the special term sustaining the demurrer is affirmed.

Opinion by *Talcott, J.*; *Barnard, P. J.*, and *Pratt, J.*, concurring.

NEW YORK CITY. CONTRACTS WITH.

N. Y. SUPREME COURT, GENERAL TERM, FIRST DEPARTMENT.

John B. Leverich, v. The Mayor, Aldermen, &c., of the City of New York.

Section 104, of chap. 137, of the Laws of 1870, with reference to founding contracts on sealed bids, considered and applied to a peculiar case.

A substantial compliance with the 53d section of the charter of New York City, requiring heads of departments to certify to the necessity of the work, is sufficient to enable a party to recover a just claim against the city even though there has not been a strict and formal compliance with the statute.

Motion for new trial by plaintiff, on exceptions ordered to be first heard at General Term.

The plaintiff sues to recover from the defendants a large sum for labor and

services performed and materials furnished, and for money paid and expended for the defendants, and at their request, in repairing the pavements of certain streets in the city of New York, between the 1st day of June and the 31st day of August, 1871. The complaint alleges that the particulars of the work performed, and of the materials furnished, and expenditures made by the plaintiff, were duly furnished by him to the Department of Public Works, and that after said particulars had been fully examined into by the officers of said department, to each of the bills was attached a certificate of the Commissioner of Public Works, certifying the necessity of the expenditure and approving the account.

Such bills were transmitted to the Department of Finance, with the necessary requisition for the payment to the plaintiff of the sums due therefor. The defenses set up are as follows. That no notice inviting bids or proposals for doing the work, or furnishing the materials, was ever published, nor was any contract made therefor as was required by statute; that no appropriation covering the expense of the work was ever made; and that the necessity of the work was never certified by the heads of Department, nor the expenditure authorized or appropriated previous to the performance thereof, as required by the charter.

It appeared from the evidence that the work which was done and for which the materials were furnished was in repairing holes in the street pavements all over the City of New York, and the evidence tended further to show that charges made for the labor and materials supplied for each separate work in no one instance exceeded the sum of five hundred dollars. The separate

bills of the plaintiff were below that amount. These bills were rendered for each work about once every two weeks, to the Department of Public Works, by which they were aggregated into accounts for repairing sundry streets, and the gross amount only stated, in sums varying from between three and four, to four and five thousand dollars. The aggregate accounts were certified as correct by the commissioner.

The evidence herein tended further to show that complaints were made in writing, showing the necessity of these repairs. Some were made by citizens, and the others came from the Police Department and the Board of Health. Upon these complaints instructions were endorsed, directing the performance of the necessary work, to make the repairs, and they were then handed to the plaintiff, who went on and performed what was so required to be done.

Robert H. Strahan, for plaintiff and applt.

D. J. Dean, for deft.

Held, That these depressions or holes in the pavements were necessarily disconnected, and the repairing of each was in and of itself "a particular job," as that phrase has been used in this section of the statute (Sec. 104, of chap. 137, of the Laws of 1870), and as neither involved an expenditure of more than the sum of one thousand dollars, it was not necessary that the work required to restore or repair it should be let by contract under the provisions of the above section of the statute.

Held further, That though formally, perhaps, the endorsements upon the complaints made by citizens, showing necessity for repairs, and directing the performance of the work necessary to make the repairs, were not certificates of the

necessity of the work, still, they were so substantially. For they contained the implication that the work directed had been found to be necessary. The statute (53d sec. of the charter), in this respect, was substantially, though informally, complied with.

Verdict set aside, new trial ordered, costs to abide event.

Opinion by *Daniels, J.*; *Brady, J.*, concurring; *Davis, P. J.*, dissenting.

MARRIED WOMAN. CONTRACT.

N. Y. SUPREME COURT, GENERAL TERM.

SECOND DEPARTMENT.

Gosman and another, *appls.*, v. Eliza L. C. Cruger and another, *respts.*

Decided February Term, 1876.

In order to operate as a charge upon her separate estate, when the engagement of a FEMME COVERT is made upon a consideration in which she or her estate has no direct interest, the intention to charge must be expressed in the contract which is the foundation of the charge.

Appeal from a judgment of the special term dismissing the complaint as to the defendant Eliza L. C. Cruger.

The action is brought against the defendant, Eliza L. C. Cruger, upon a bond signed by her, whereby she became one of the sureties of Edwin R. Olcott, as the guardian of the plaintiffs, then being minors. The special term dismissed the complaint as to Mrs. Cruger, who, it appeared, was a married woman at the time of the execution of the bond, upon the ground of her coverture.

Elihu Root, for the appls.

C. Frost, for the respts.

Held, The decision at the special term was in accordance with the settled law of this state, as laid down in several decisions of the court of last resort,

by which it has been determined that the contract of a married woman, except such contracts as relate to the business in which she has been engaged on her own account, under the statute which authorizes her to carry on business on her own account, is void at law; and any separate estate which she may own at the time of making the contract, can be charged with liability for a debt founded on such contract, only when the intent to charge it is "declared in the contract which is the foundation of the charge, or when the consideration is for the direct benefit of her separate estate."

Judgment affirmed with costs.

Opinion by *Talcott, J.; Pratt, J.*, concurring.

WILL. ESTATE FOR LIFE.

ENGLISH HIGH COURT OF JUSTICE.
CHANCERY DIVISION.

Muskett v. Eaton.

Devise to C. M. for life, and in the event of his leaving a son born or to be born in due time after his decease who should live to attain the age of twenty-one, then to such son and his heirs if he should live to attain twenty-one, with remainder over:

Held, *That on the death of C. M. his infant son took a vested estate in the devised property, subject to be divested if he should die under twenty-one.*

Lucy Martin, the testatrix in the cause, by her will, dated the 21st of March, 1866, after appointing her nephew Charles Muskett, Charles Eaton, and Charles Thomas Muskett, her executors, and giving them each a legacy, proceeded as follows: "I give and devise to Charles Muskett, the farm and hereditaments called 'The Folly' for his life, and in the event of his leaving a lawful son born or to be born in due time

after his decease who should live to attain the age of twenty-one years, then I give the same farm and hereditaments unto such son and his heirs if he shall live to attain the age of twenty-one years; but in case my said nephew should die without leaving a son who should live to attain the said age of twenty-one years, then I give the aforesaid hereditaments, after the death of him, my said nephew Charles Muskett, to George Muskett Eaton and his heirs."

The testatrix died in 1871.

Charles Muskett entered into possession of the farm and hereditaments called "The Folly," and died on the 22d of February, 1875, having made a will and appointed Charles Eaton, John Thomas Muskett, and William Muskett Elliott, executors and trustees thereof, and leaving the plaintiff, his only son, an infant of the age of six years.

The plaintiff, by his next friend, filed his bill against George Muskett Eaton, and the trustees and executors of Charles Muskett, deceased, as defendants, praying that the true construction of the will might be declared. The only point calling for a report related to the construction of the above-stated devise.

Held, The question is whether the words "attain the age of twenty-one years" are part of the description of the devisee, so as to bring the case within the rule laid down in *Nesting v. Allen*, where the gift was, in substance, a gift to "such child of A. as shall attain twenty-one." But it cannot be so. It is an immediate gift to the son of Charles Muskett, with a proviso as to his attaining the age of twenty-one years; because the words are, "a lawful son born or to be born in due time after his decease;" and the testatrix must be taken to have

known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he could not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the plaintiff takes a vested estate subject to be divested in the event of his dying under twenty-one; and I so decide.

Opinion by *Jessel, M. R.*

MORTGAGE OF CHATTELS, MORTGAGOR REMAINING IN POSSESSION. MORTGAGE OF AFTER ACQUIRED CHATTELS

U. S. DISTRICT COURT, DISTRICT OF
MASSACHUSETTS.

Brett v. Carter.

Decided December Term, 1875.

A mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business is not void per se. Whether there is a fraud in the particular case, is a question of fact.

A mortgage of after-acquired chattels is valid.

Bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that in November, 1874, Sargent bought out the stock in trade of the defendant Carter, as carried on by him in a certain shop in Beacon street, Boston; and on the same day gave back a mortgage to secure the payment of the purchase money by installments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock, "and

any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one that if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were fully paid, but one that came due in November, 1875, not having been paid in full, the defendant demanded further security, and a mortgage was given of such stock as had been acquired during the year. This was about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainant afterwards asked leave to amend, and alleged the first mortgage to be void on the ground that the mortgagor was tacitly permitted to sell all the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

J. B. Richardson, for the plff.

C. K. Fay, for the deft.

Held, I had supposed it to be well settled, after much debate and conflict of opinion certainly, but substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods, and act as apparent owner, with or without power to sell them, the question whether this was a fraud or not, was one of fact in each case, excepting under a particular clause in the bankrupt law of England, which has not been adopted in this country.

It is very strange that after our legislatures have met the difficulties of *Twyne's Case*, by requiring registra-

tion, which gives not only constructive, but in most cases actual, notice of mortgages, and after many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harder doctrine which had already grown obsolete, that such deeds should be held void in law if the mortgagor retained possession and control. This is all that those cases amount to.

The doctrine is combatted with great force of reasoning, much greater than has ever been expended in its support, in the two cases following, to which I have great pleasure in referring: *Hughes v. Cory*, 20 Iowa, 399; and *Gay v. Bidwell*, 7 Mich., 519.

The second point in this case is no less interesting than the first. By the mortgage the stock that shall be put into the shop by the mortgagor is included in the conveyance. It is undoubtedly the law of courts of equity, that after-acquired chattels, definitely pointed out, as, for instance, by reference to the ship, mill, shop, or place into which they are to be brought, may be lawfully assigned as security. The common law recognizes such transfer of land, by way of estoppel, and of chattels when they are the produce either of land, or of chattels already owned by the transferor, but not of future chattels *simpliciter*, unless there be some *novus actus interveniens* after the chattels are acquired, that is to say, either some new transfer, or possession taken under the old.

It is true that many of the late cases have arisen upon mortgages given by railroad companies, and some few judges have founded a distinction upon that circumstance. But there is no differ-

ence in principle between a mortgage by such a corporation of its rolling stock not yet *in esse*, and that by a trader, of his future stock in trade in a particular shop, and none can be successfully maintained. The truth merely is that from the nature of these railway mortgages, and their magnitude and importance, attention has been called to the great injustice that would be done in displacing the first mortgage in favor either of general creditors, or even of subsequent mortgagees. But the injustice exists in all such cases in a less degree.

I rather incline to the belief that the law of Massachusetts in equity is to-day, that a mortgage of after-acquired chattels is valid.

I am of opinion that the mortgage of 1874 created a valid lien in behalf of the defendant upon the stock of goods in the shop at the time of the bankruptcy, and that the mortgage of 1875 does not vitiate their lien.

Opinion by *Lowell, J.*

INNKEEPER. NEGLIGENCE. EVIDENCE.

N. Y. COURT OF APPEALS.

Faucet, respt., v. Nichols, applt.

Decided March 21, 1876.

In an action against an innkeeper for loss of a guest's property by fire, when the defense, under chapter 638 laws of 1866, was that the fire was of incendiary origin, and defendant's witnesses had given testimony tending to establish, and plaintiff's witnesses testimony tending to rebut the defense evidence, that an attempt to fire an adjacent building, on the same night is admissib'e.

Negligence by an innkeeper in omitting precautions which a prudent man ought to take to protect the property of a guest, will deprive him of the benefit of the statute of 1866.

This action was brought against defendant, as an innkeeper, to recover the value of a span of horses, buggy, &c., destroyed by the burning of defendant's hotel barn. The defense was, that the fire was the work of an incendiary and occurred without fault or negligence on the part of defendant, and that defendant therefore was not liable under section 1, chapter 638, laws of 1866.

Evidence was given on the part of the defendant, tending to show that the fire was the work of an incendiary and was set in the hay loft, to which access was had through a window of the barn opening into an alley, which had been left open for several weeks, and that during this time lumber was piled against the barn, so that a person could easily climb upon it and enter the loft through the open window. The court submitted to the jury the question whether defendant, under the circumstances, was chargeable with negligence, and ruled in substance, that if the jury should find that this was a negligent act which contributed to an incendiary firing of the barn, defendant was liable for the loss sustained by the plaintiff.

W. B. Ruggles for resp't.

Geo. B. Bradley for applt.

Held, That the question of defendant's negligence was properly submitted to the jury; that negligence on the part of an innkeeper in omitting precautions which a reasonable and prudent man ought to take to guard against an incendiary fire, is such negligence as will deprive him of the benefit of the statute. 2 L. Raym, 909; 1 E. & B., 165; 51 N. Y., 180.

Negligence which precedes and facilitates the commission of the crime, is as much within the statute of 1866 as

the negligent omission to protect and remove the property of the guest after the fire had commenced. It appeared that the fire occurred between nine and ten o'clock in the evening. The fire was discovered near the window of the loft, and it was shown by the defendant that two persons, not recognized or identified, ran out of the alley from near the barn just after the alarm was given and disappeared. His witnesses also testified to appearances, indicating that kerosene or some other combustible fluid had been put upon the floor of the barn. Defendant and his servants and the tenant, who occupied a part of the building, testified that the fire was not produced by their act or neglect. Plaintiff controverted the fact alleged by defendant that the fire was the work of an incendiary, gave evidence tending to contradict the testimony of the defense to the presence of kerosene or other burning fluid on the barn floor, and one of plaintiff's witnesses testified that defendant's ostler was accustomed to smoke in the barn, and that he saw him about eight o'clock on the night of the fire on the bedding in one of the rear stalls smoking a pipe and reading by the light of a lamp.

Held, That this evidence was properly received, as each party had the right to show any circumstance in support of his theory as to the origin of the fire which legitimately tended to establish it.

Defendant called on T. as a witness and offered to show by him that on the next street west, within forty rods of the barn which was burned, on the same night, an attempt was made to fire a building at a point where the building was close and compact, and that kerosene, paper and other combustibles were used in the attempt.

This evidence was objected to as immaterial and was excluded.

Held, error. That the evidence offered had a direct and material bearing upon the question as to the character of the fire which destroyed the barn.

Judgment of General Term, affirming judgment for plaintiff on verdict, reversed and new trial granted.

Opinion by *Andrews, J.*

EXCEPTION. PRACTICE. USURY

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Charles E. Strong, as receiver &c.,
respt., v. The N. Y. Laundry Manufacturing Company, *et al.*, *appls.*

Decided January 28, 1876.

Where a general exception is taken to the refusal of a judge to direct a verdict for defendants, no request being made that the justice submit to the jury any questions of fact, on appeal the party making the request is concluded by the finding of the justice from raising the point that specific questions of fact should have been submitted to the jury—the justice having thereafter directed a verdict for plaintiff.

The defence of usury should be made out by a fair preponderance of evidence.

This action was brought against the corporation defendant, maker, and the individual defendants as indorsers of a promissory note. The answer set up that the note was made for the accommodation of Everett Clapp, and was endorsed by Gill for his accommodation, without any consideration having passed between the parties until Everett Clapp endorsed it and delivered it to the Atlantic National Bank, of which plaintiff is receiver. That such transfer was made by Clapp upon an usurious agreement, and that the bank received more than seven per cent.

When the parties rested upon the trial the defendants made several requests, either to direct a verdict for them generally or for some one of them, which was denied. There was no request to submit any question of fact to the jury. Upon plaintiff's motion the court directed a verdict for plaintiffs, exceptions to be heard in the first instance at the General Term.

Sewell & Pierce for *appls.*

S. B. Marsh for *respt.*

Held, That the defendants, by the course pursued by them, rested upon the ground that the usurious agreement had been successfully sustained by the evidence, and called upon the court to dispose of the case upon questions of law arising from undisputed facts. Their request assumed there was no dispute about the facts, and nothing, therefore, to go to the jury. They allowed the judge presiding to be substituted in the place of the jury, and not having asked that the questions presented by the facts should be submitted to the jury, they are concluded by the finding of the justice. *Wacchell v. Hicks*, 18 N. Y. Rep., 558; *Marine Bank of New York v. Clements*, 81 N. Y. Rep., 33.

Defendants cannot, therefore, upon appeal, under a general exception to the judge's subsequent direction that a verdict be entered for the plaintiff make the point that there were questions of fact which should have been submitted to the jury. They are therefore deprived of any advantage, either from the exception taken to the refusal to grant their requests or either of them, or to the direction of the judge that a verdict be entered for the plaintiff. But upon the examination of the case, it appears that the evidence given in behalf of the defense did not satis-

factorily sustain the defence of usury. Upon the defendant's evidence it is left doubtful whether the note was an accommodation note or not. The defence of usury should be made out by a fair preponderance of evidence, and it does not seem to have been in this case.

Judgment affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

NEGOTIABLE NOTE. SURETY. EVIDENCE.

N. Y. COURT OF APPEALS.

Hubbard, applt., v. Gurney, respt.

Decided March 21, 1876.

In an action by the payee of a note against one of two makers, parol evidence is admissible to show that defendant signed the note as surety.

If the payee, under such circumstances, take a new note of the other makers, extending the time of payment, and procures the new note to be discounted, the surety on the first note is discharged; the raising of the money on the new note is a sufficient consideration.

This action was brought upon a promissory note given by S. H. G., and defendant being surety in fact for \$1,000, dated April 5, 1872, payable one day after date to plaintiff. May 18, 1872, a new note was given by S. H. G., payable at thirty days and indorsed by plaintiff, upon which the money was obtained and paid to plaintiff. When this note became due a small payment was made and a new note given payable in thirty days, upon which \$300 was afterwards paid, leaving a balance of \$700 unpaid, which plaintiff paid. The note in suit was given with the understanding that one B. was to sign as surety, but not doing so defendant signed instead. There

was no agreement between plaintiff and S. H. G. that the new note should be taken as collateral to the old one, and that the latter should be retained as security. Defendant did not know of any of the transactions between S. H. G. and plaintiff. Defendant proved under objection by parol that he signed the note as surety, the court overruling the objection and plaintiff excepting.

Held, no error; That parol proof that defendant signed the note as surety was admissible, it being material for the purpose of enabling him to establish the defense that he was discharged by the extension of time given S. H. D. by plaintiff, the latter knowing that defendant had signed as surety.

Also held, That from the facts proved there appears to have been an implied agreement to take the new note as a payment of the first, or to extend the time of payment of the latter in favor of S. H. G. As this was done without the knowledge or assent of defendant his rights were thereby affected and he was discharged, 3 Den., 512; 23 Barb., 478; 39 id., 610; 43 id., 444; 38 N. Y., 96. That the fact that the original note was not surrendered did not change the legal effect or real character of the contract to be implied from the transaction, 6 Duer, 304; 5 Hill, 465. That the raising of the money upon the new note, and the receipt thereof by plaintiff, was sufficient consideration for such a contract.

Halliday v. Hart 30 N. Y., 474; *Cary v. White* 52 N. Y., 138, distinguished.

Judgment of General Term, affirming judgment on verdict for defendant, affirmed.

Opinion by *Church, Ch. J.*

BANKRUPTCY.

ENGLISH HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

In re Pettit's Estate.

Decided January 22, 1876.

After the close of a bankruptcy, property falling in to the bankrupt belongs to him, and not to the trustee in bankruptcy, although the bankrupt has not obtained an order of discharge.

Adjourned summons.

On the 6th of December, 1872, Richard Pettit was adjudicated a bankrupt, and on the 14th of January, 1873, a trustee was appointed.

On the 18th of June, 1873, the bankrupt passed his last examination; and by an order made before four o'clock in the afternoon of the 14th of April, 1874, and filed on the 16th of April following, the bankruptcy was declared to be closed.

On the same 14th of April, but after five o'clock in the afternoon, R. Pettit's father, Walter Pettit, died, having by will bequeathed to him one fifth of his (the testator's) residuary estate.

On the 23rd of April, 1874, the trustee in the bankruptcy applied for his release, which, by an order of the 16th of June, 1874, was granted to him.

R. Pettit had not obtained, nor had he applied for, an order of discharge.

The executor having paid the fund representing R. Pettit's share into Court, the Registrar of the Court of Bankruptcy having jurisdiction in the bankruptcy during its continuance, claiming to be the present trustee of the estate and effects of R. Pettit (see sect. 83, sub. sect. 3, of the Act, and Rule 124 of the Bankruptcy Rules, 1870), on the 23rd of November took out the present summons, which was in effect an application that the fund might be paid to him.

Held, Where a bankruptcy has been closed, and the debtor has not obtained an order of discharge, the creditors

have certain remedies still subsisting, which are pointed out by the Act and Rules, but the right to take the debtor's property acquired since the close of the bankruptcy is not one of those remedies.

After the close of a bankruptcy, the bankruptcy exists for certain purposes only. Amongst those purposes is not that of vesting the debtor's after acquired property in the trustee.

Opinion by *Bacon, V. C.*

APPEARANCE. JURISDICTION

N. Y. SUPREME COURT, GEN. TERM.

SECOND DEPARTMENT.

Ferguson, applt., v. Crawford and others, respts.

Decided February Term, 1876.

An unauthorized appearance by an attorney gives jurisdiction, and the subsequent proceedings in the action cannot be attacked in a collateral proceeding, on the ground that such appearance was unauthorized or forged.

Appeal from a judgment in favor of the defendants, in an action brought for the foreclosure of a mortgage on premises on which a first mortgage had been foreclosed, in an action in which the present plaintiff appeared by attorney. Plaintiff offered to show that the notice of appearance was a forgery; the evidence was excluded.

William F. Purdy, for the applt.*J. O. Dykman*, for the respts.

Held, An appearance, without authority, has been held, in this State, to give jurisdiction, and could not be attacked collaterally.

The rule rests upon grounds of public policy, and not wholly upon the law of agency.

Judgment affirmed, with costs.

Opinion by *Barnard, P. J.*; *Talcott, J.*, concurring.

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[No. 15.]

POWER OF A COMMERCIAL EXCHANGE TO COMPEL MEMBERS TO SUBMIT TO ARBITRATION. BY-LAWS.

ST. LOUIS COURT OF APPEALS.

State *ex rel.* Kennedy v. Union Merchant's Exchange, *et al.*

Decided April, 1876.

A by-law of a corporation which compels members to submit all their business controversies to arbitration, and requires them to comply with the awards of the arbitrators, on pain of suspension or expulsion, is unreasonable, and hence void.

A by-law will not be set aside as unreasonable, if there is any equipoise of opinion in the matter; its unreasonableness must be demonstrably shown.

A by-law made in pursuance of an express power in the charter to make such laws, is void, if contrary to the common law, or to a legal enactment.

Appeal from circuit court of St. Louis county.

This is a proceeding by *mandamus* to compel the appellants to reinstate the relator as a member of the Union Merchants' Exchange of St. Louis.

It appears that relator is a general provision and commission merchant of St. Louis; that defendant, the Union Merchants' Exchange, is an incorporated institution, of which the other defendants are directors; that the Exchange numbers among its members over one thousand merchants and business men of St. Louis, and occupies commodious rooms in which these merchants daily meet to trade, and where, at the common cost of the members, and for their exclusive benefit, they daily receive trade reports from the

chief commercial centers of the world; that this Exchange is the business mart of St. Louis, and owns valuable personal property in which all the members have a vested interest; that relator became a member of said exchange on the 18th day of July, 1871, and has, up to the time of the alleged wrong complained of by him, remained so; and that on 17th July, 1874, he was suspended from membership by the directors, and has since that date been denied access to the floor of the exchange, and deprived of all the benefits of membership.

These facts are set up in the petition, and are not denied in the return to the writ. An alternative writ was issued; and, in their second amended return to this writ, the appellants set up that, prior to their incorporation, the Union Merchants' Exchange had long existed as an association of merchants of St. Louis, with rules, regulations, and by-laws to which members were required to assent; that by its charter it has power to make such rules and regulations as may be proper and needful, and possesses all other general powers incident to corporations and not inconsistent with the laws of Missouri and of the United States; that, by said charter, the then existing rules, regulations and by-laws are declared the rules of the corporation until regularly repealed or changed; that the by-laws and regulations now in existence were legally enacted in accordance with the charter, and were in force when plaintiff's relator was admitted as a member; and that he applied to be admitted subject to the existing rules and by-laws, of which he had full knowledge, and was admitted subject to these rules; and that he has knowingly and deliberately violated these rules, and been lawfully

suspended in accordance with the by-laws for this violation of the laws of the association. That he has, by the by-laws, a legal right to apply to be reinstated in his rights as a member, and has neglected to do so. This is a mere outline of the substantial features of return to the writ. It is not necessary to set it out in detail nor to refer to any technical objections made to it in the demurrer filed by the relator of plaintiff. The demurrer was sustained, and a peremptory writ ordered; and a motion for a new trial and a rehearing having been overruled, the cause is brought up by appeal.

The by-laws of the Union Merchants' Exchange are set out in full in the return; and the offense committed by relator, for which he was suspended, was a refusal to comply with an award of arbitrators, to which he had, in accordance with the by-laws, agreed in writing to submit.

Held, The law is not opposed to arbitration. On the contrary it is said to be the policy of the law to encourage these domestic tribunals, although they may, if they choose, disregard the rules of law in their decisions.

But though the law encourages this reference to a tribunal of the choice of the parties, which relieves the courts of a burden and the public of a heavy expense, and which sometimes can do and does a right that the courts cannot, it will not have persons coerced into waiving their strict rights if they choose to insist upon them. Every citizen has a right to the protection of the equal laws, and to all the security against irremediable injustice which the wisdom of centuries has provided in those traditional rules or legislative enactments that govern proceedings in courts of justice.

To set aside a by-law, there must be no equipoise of opinion in the matter; its unreasonableness should be demonstrably shown.

A by-law made in pursuance of an express power to make such laws, if contrary to the common law or to a legal enactment, is void. Every by-law must be reasonable and lawful. (8 Pick, 96; *Dunham v. Rochester*, 5 Cowen, 462; Com. Dig., By-law B.)

In view of the character and objects of this corporation, and the manifest inconvenience to which every trader must necessarily be subject who is not permitted to join, or is expelled from the chief mart of commerce in the place of which he is a citizen and a trader, we think a by-law compelling the members of the Union Merchant's Exchange to submit their controversies to arbitration on pain of suspension or expulsion is unreasonable in the legal and technical sense of that term, and that it cannot be sustained.

We are, therefore, of opinion that the circuit court committed no error in sustaining the demurrer to the return in this case.

The judgment of the circuit court is affirmed.

Opinion by *Bakerwell J.*; *Gantt* and *Lewis, J. J.*, concurring.

TAXING COSTS.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPT.

Charles Goodman, *et al.*, v. F. Guthman, Jno. H. V. Arnold, *respt.*, Henry Tetlow, *applt.*

Decided March 31, 1876.

Order affecting a substantial right, though discretionary, is appealable. Where plaintiff's attorney taxed unlawful items in his bill of costs, a subse.

quent judgment creditor of the same debtor may apply by petition to have the costs readjusted, and the excess applied to his judgment.

The motion papers are properly served upon the first plaintiff's attorney.

On the 8th of April, 1873, the plaintiff, Goodman, brought suit against Guthman, and attached certain money due the latter from the Imperial Ins. Co.

On the 24th of April, Tetlow brought suit against the same defendant, and attached the same money.

Judgment was entered in both actions by default.

The amount received (\$579.80) being insufficient to satisfy both claims, Goodman's judgment, \$529.70, was first paid. Of this but \$368.70 was paid to Goodman, and \$190.60 was taxed as costs, which were taxed the same as if an issue had been joined and a trial had. The disposition made of the balance does not appear.

The plaintiff in the second action claiming that the costs taxed in the first were excessive and illegal, made application by a petition, setting forth the facts in proper form, to have the costs readjusted, and to have all the excess over the legal costs applied on his judgment.

This was opposed, mainly, on the ground that the attorney, on whom the moving papers had been served, had settled with his clients, paying them the amount they were entitled to receive, and that he had no further connection with the matter.

The court below denied the motion.

The order affecting a substantial right, even though it may involve the exercise of discretion, is appealable.

J. II. V. Arnold, for resp't.

A. II. Hitchcock, for applt.

On appeal

Held, That the application by petition was in proper form, and sought the proper remedy, a readjustment of the costs, and payment of the excess to petitioner.

The court has full power to dispose of conflicting interests and claims, arising out of the use made of its process and judgment, when application is made upon motion by way of petition and notice, and to adjust and determine a proper mode for distributing the proceeds of the debtor's property equitably among the creditors.

In this case the attorney is the substantial party proceeded against, and should not be permitted to defeat the application, by settling with his clients, for they have received none of the property required to be refunded. Nor was it essential that the motion papers should have been served upon them. The attorney in the first action, through an improper adjustment of the costs received a considerable amount which otherwise would have been applied upon the second judgment.

He had no right to the items unlawfully charged, and should not be allowed to retain them because of a successful expedient, which he ought not to have adopted.

Order reversed, and an order entered directing a readjustment of the costs in the controversy.

Opinion by *Daniels, J.; Brady, J.*, concurring.

TRUSTEE.

N. Y. COURT OF APPEALS.

Hull, applt. v. Mitchison, resp't.

Decided February 22, 1876.

A trustee who has faithfully performed his duty as such cannot be removed on the application of the cestui que trust.

Application by a trustee for relief refused in a peculiar case of a foreign trust.

This action was brought to remove defendant from the position of trustee and for the appointment of a new trustee resident in this State. The referee found that plaintiff, under the will of her father was entitled to a certain interest in real estate in Pennsylvania; that plaintiff by a post nuptial contract executed by her and her husband, which was lawful and valid under the laws of Pennsylvania, conveyed her interest in the real estate to one K. as trustee, and provided that K. should, at her option, permit and suffer her, she being a married woman, to let and demise, use and occupy and enjoy the premises thereby granted, and receive and take the rents and income during her natural life for her separate use and support. K. having died, defendant was appointed trustee. Prior to defendant's appointment the real estate had been converted into money which was paid over to defendant as trustee, and by him invested in the purchase of a house and lot in New York city.

The referee also found that defendant had in all things performed his duty as trustee, and found as a conclusion of law, the answer asking affirmative relief to that effect, that defendant was entitled to have the trust estate converted into money that it might be reinvested in a lawful and proper manner, and that he was entitled to retain the amount due to him for commissions and disbursements and the expenses of reinvesting the trust fund.

Geo. F. Comstock for applt.

W. W. MacFarland for resp't.

Held. That the referee having found that defendant had performed his duty as trustee, plaintiff could not have an

affirmative judgment in accordance with the prayer of her complaint.

That before defendant could have the relief given by the judgment it was necessary for him to show that the provision in the past nuptial contract given plaintiff (*cestui que trust*) the control of the trust estate, made a legal active trust in the grantee under the laws of Pennsylvania, and that this must be found by the referee as a ground for his legal conclusion and judgment, and there being no such evidence or finding, the judgment giving defendant the affirmative relief sought could not be sustained.

Per curiam opinion for reversal and new trial.

AMENDING PLEADINGS.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Wm. A. Seaver, collector, &c., *resp't.*,
v. The Mayor, &c., *applt.*

Decided May 5, 1876.

Where defendant believes in good faith that he is concluded from pleading a certain defence, and therefore omits it in his answer, but afterwards and before trial, learns that the disability as to the particular defence is removed, he should be allowed to amend his answer, and to set up this defence.

In such a case defendant should pay all costs incurred from the serving of his original answer.

Appeal from order denying motion for leave to serve an amended answer.

This action was brought in February, 1873, to recover a balance of \$90,337.50, claimed to be due plaintiff's decedent, for labor and money expended in regulating, grading and curbing 10th Avenue from Manhattan to 155th St. The complaint set out the nature and terms of the contract, and also the

commissioners, certificate, that the contract was free from fraud. The answer,

(1.) Denied that the contract was ever actually made.

(2.) Denied that there had been sealed bids and proposals, or precedent resolutions of the common council.

(3.) Denied the amount of labor or material as set up in complaint, or complied with terms of contract.

(4.) Alleged the materials furnished to have been inferior.

(5.) Denied the validity of the certificate. It however contained no direct allegation of fraud.

On these issues the case went to trial, when plaintiff was non-suited. The general term sustained this judgment, but the court of appeals reversed this decision, holding that the defects in the contract were cured by chap. 5, laws of 1871, also holding that the commissioners, certificate was invalid, as they had no jurisdiction and that defendant might give evidence of fraud.

A new trial was ordered.

The defendant now applies for leave to set up as a defence, fraud in the inception of the contract, claiming that when the answer was originally drawn it believed itself to be concluded from alleging fraud, by the commissioners certificate; but that the court of appeals having declared that to be of no effect, they now seek to avail themselves of the benefit of that decision.

The application was denied, for the reason that two of plaintiff's most important witnesses on the question of fraud, Brown, the contractor himself, and Tracy, the engineer of the department of public works, were both dead.

Francis Lynd Stetson, for applt.

John E. Develin, for resp't.

On appeal.

Held, That the defendant in its answer omitted the allegation of fraud which its officers believed could be shown in the case, for the reason that it believed itself to have been concluded in attempting such a defence by the commissioners, certificate; but the decision of the court of appeals seems to have removed that disability, and fraud could now be properly alleged. The circumstances in the case seem to be sufficient to excuse the omission of this defence in the first instance. It was omitted in good faith under a misapprehension, and justice would appear to require that an opportunity be given defendant to set this up. Nor should the death of two of the plaintiff's witnesses prevent this, even though it may to some extent be unfortunate for plaintiff, for if the contract was fraudently obtained or the work fraudently done, the public should not be cause of these witnesses' absence, be compelled to bear the burden of fraud. If the defence of fraud is not established, then plaintiff's claim so far as it may be sustained will be allowed, and the absence of the deceased parties will not prevent that result; and if the demand be fair and honest there is no reason for supposing that defendant can show it to be fraudulent.

The case is a proper one for allowing the amendment desired, but as it will raise an entirely new issue, and as the one presented by the present answer has been decided against the defendant, it should be on payment to plaintiff of all costs since the answer was served.

Order reversed and an order entered allowing defendant to amend its answer on above terms.

Opinion by *Daniel, J. Davis, P.*; *J.*, and *Brady, J.*, concurring.

AGENCY. COLLECTION OF COMMERCIAL PAPER BY BANKS.

U. S. CIRCUIT COURT, N. D. OF ILLINOIS.

Albert G. Hyde, *et al.*, v. The First National Bank of Lacon.

Where commercial paper is sent to a bank for collection, the bank becomes not an agent for the sender, but an independent contractor, and may employ another bank to make the collection; but the latter is accountable only to the first bank, not to the owner of the paper.

This action was brought to recover of defendant a certain sum of money charged to have been collected by defendant for plaintiffs, of John Hutchins. Plea, general issue. It was tried by stipulation, by court.

The evidence showed that John Hutchins, of Lacon, in this State, gave his note to the plaintiffs, residents of New York city, for \$407.63, on the 15th day of September, 1874, payable in four months, at the First National Bank of Lacon, the defendant. The plaintiffs indorsed the note to the order of A. Hest, Esq., cashier, for collection for their own account. Hest then indorsed it to the defendant, for collection for Cook County National Bank. Mr. Hest was the cashier of the Cook County National Bank, and sent the note in a letter to defendant on the 11th day of January, 1875, with instructions "to collect and credit." The defendants kept an account with the Cook County Bank, and then had a considerable sum in that bank. The note was paid to defendant on the 18th of January, 1875, and credited to the Cook County Bank, as other collections in the usual course of business. The defendant remitted, on that day, to the Cook County Bank, more money than this collection amounted to, and

had at that time, a large balance due it from that bank.

The Cook County Bank failed on the 19th January, but the defendants had no knowledge of its failure or embarrassment until about noon on the 19th.

The testimony also showed that custom between that bank and defendant, and also between the other Chicago banks and their country correspondents, was to make collections of notes sent there for that purpose, and credit the proceeds to the bank transmitting them. That no account was kept with any other person of such paper sent for collection, and that this custom prevailed as well when the paper was endorsed to the bank sending for collection on account of their own, as when indorsed generally, and accounts of all such transactions, in all cases, were kept in the same way.

Held, That when an owner of commercial paper sends it to, and it is accepted by, a bank for collection, whether payable at the place where such bank is located, or elsewhere, in the absence of any contract to the contrary, there is an implied agreement with such bank arising from the acceptance of the employment, that it will perform all the acts necessary for the collection, and if not paid, of charging the parties thereto. It is not regarded as the appointment of the bank as the attorney of the owner of the paper, authorized to select other agents suitable and competent for the purpose of collecting the note, but on the contrary, "its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated, are its agents, and not the agents of the owner of the note." That its duty is not discharged when it

selects responsible agents to perform the duty intrusted to it. That the owner of the paper is not to look to the responsibility of the agents entrusted by the bank with its collections. That the bank to which he commits the paper is alone answerable to him for the performance of all acts necessary to secure his rights, including the payment of the money when collected, and that the liability to pay over attaches as soon as the money is paid, either to it or a sub-agent selected by said bank to collect for it.

Judgment for defendant.

Opinion by *Hopkins, J.*

AGENT. INSURANCE.

N. Y. SUPREME COURT—GENERAL TERM, FIRST DEPARTMENT.

John S. Kline and Clinton McClarty, Receivers, &c., *appls.*, v. The Queen Insurance Company, *respt.*

Decided May 5, 1876.

A general agent having the custody and control of his principal's property with full power to preserve and dispose of it in the way he deemed most appropriate to the success of the business, has a sufficient interest to entitle him to insure the property.

And where such property has been insured as property held in trust by the person to whom the policy issued, such property will be regarded as coming within the terms of the policy.

Appeal from judgment recovered on the report of a referee.

This action was brought to recover for loss and damage by fire upon a policy of insurance issued by defendant.

The following facts were found by the referee:

That the defendant, a corporation, January 21, 1873, made and delivered its certain policy of insurance insuring the original plaintiff, Wellington J.

Hardy (the present plaintiffs were afterwards substituted, having become possessed of the former plaintiff's rights) in the sum of \$6,000 on merchandise, principally whiskey and packages containing the same, "their own or held by them in trust or on commission, or sold but not delivered, contained in buildings Nos. 213 and 215 State street Boston, Mass.," against all loss or damage to the same by fire for and during the term of twelve months from said date.

That in October, 1873, a fire occurred upon the premises described in said policy, which loss and damage exceeded in amount the sum of \$6,000.

That the goods insured were the property of W. J. Hardy & Co. of New York, a firm composed of Milton J. Hardy and Charles B. Moorman.

The firm had no store in Boston, but shipped goods there from time to time as sold, and in anticipation or expectation of sales.

That the original plaintiff was clerk for said firm at Boston, and was authorized under a written power of attorney to sell goods of said firm and collect the proceeds of such sales in the name of said firm as their attorney.

Under the power of attorney, W. J. Hardy took charge in Boston of the New England business of M. J. Hardy & Co. A bank account was kept in a Boston bank in the name of M. J. Hardy & Co., and plaintiff deposited in it receipts for sales and the New York firm drew in the name of that firm. Afterwards, however, for certain business reasons, W. J. H. opened a bank account in his individual name, sold M. J. Hardy & Co. goods in his own name, and as to third parties appeared to be transacting business on his own account. These goods were, however, the property of M. J. Hardy & Co.,

and the net proceeds thereof were paid over to them from time to time by the plaintiff; all expenses connected with the business being paid out of the proceeds of sales, the plaintiff being paid a salary, and having no personal interest whatever in the goods or their sale. Plaintiff rented the lofts in the premises described in the policy, but the rent for the same was paid out of the funds of M. J. Hardy & Co.

The referee refused to find as a matter of fact that the goods so destroyed or damaged by fire were held by the plaintiffs in trust for M. J. Hardy, or were held by the original plaintiff (W. J. H.), in trust at all, but found as conclusions of law

1. That the plaintiffs, at the time of the fire had no insurable interest in the goods upon the premises destroyed.

2. That the goods destroyed and damaged by fire as above stated, were not held by the plaintiffs in trust for M. J. H. & Co., or in trust at all, within the meaning of the policy of insurance.

3. That the complaint should be dismissed with costs.

F. N. Bangs for appls.

James Emott for resp't.

Held, That W. J. Hardy, the original plaintiff, was much more than a mere clerk. He was a general agent having the custody and control of his principals' property with full power to preserve and dispose of it in the way he deemed most appropriate to the prosperity and success of their business, and liable to account to them for it or its proceeds when called upon for that purpose. The care, management and sale of the property constituted his employment and to the extent of its continuance he was interested in its preservation. An entire or partial destruction of the property would necessarily end

or abridge that employment. And the risk of loss in that manner was sufficient by the way of interest to entitle him to insure the property. In a general sense, too, and as that term is ordinarily used, he held the property committed to his custody for the purposes of the business in trust for the firm. It was under his charge and subject to his disposition, and to that extent had been intrusted to him. He did not hold or control or sell it for himself but for his principals, and that in the ordinary signification of the term was a trust.

The plaintiff had an insurable interest. *Crawford v. Hunter*, 8 Tenn. W. E., 14; 5 Bos. and Pull, 268, 280, 294; *Stilwell v. Stables*, 19 N. Y., 401; 45 N. Y., 606.

Instead of dismissing the complaint the learned referee should have held the plaintiffs were entitled to recover.

Judgment reversed. New trial ordered. Costs to abide event.

Opinion by *Daniels J.*; *Davis, P. J.* and *Brady, J.*, concurring.

ACCOMMODATION NOTE.

N. Y. SUPREME COURT, GENL. TERM,
FIRST DEPARTMENT.

The Grocers Bank, *applt.* v. Thomas D. Penfield et al., impleaded, *respts.*

Decided March 5, 1876.

Where an accommodation note is given and used as a collateral and has not been diverted, the person holding it as collateral may recover against the makers.

An agreement to extend time on the original debt may be presumed from circumstances.

Appeal from judgment entered on the report of a referee in favor of the defendants.

This action was brought against the

makers and endorser of two promissory notes. Judgment was taken by default against the endorser to whose order the notes were payable. The makers defended on the ground that the notes were accommodation notes, and that plaintiffs were not *bona fide* holders. The payee of the notes was liable, when these notes were given to plaintiffs, on another note as endorser, and being unable to pay it gave a check for what money he had deposited with plaintiffs, and procured these two accommodation notes, payable to his own order, and turned them over to plaintiffs. There was nothing said about an extension of time, and the bank did not surrender the first note, although they took no steps for its collection, and the debtor on the trial before the referee testified that at the time of turning these notes over he expected that the time would be extended.

Edward I. Blankman for applt.

Charles H. Truax for respt.

Held, That as no diversion was shown, an extension of time was such a consideration as would enable plaintiffs to recover, and that an agreement to extend might be implied from circumstances and should have been so implied in this case.

Judgment reversed and new trial ordered.

Opinion by *Daniels, J.*; *Davis, P. J.* concurring; *Brady, J.* concurring in the result.

Brady, J. writes an opinion in which he holds that where an accommodation note is not diverted it is available in the hands of one holding it only as collateral security.

BOARD OF CANVASSERS. CONSTRUCTION OF STATUTES.

N. Y. COURT OF APPEALS.

Harkens, applt., v. Mayor, &c., of New York, respts.

Decided January 25, 1876.

The Board of County Canvassers of New York City are organized as a distinct board for special service, and not as town officers, and have the right to designate the papers in which their proceedings shall be published.

The provisions of the Revised Statutes relating to publication of proceedings by County Canvassers (1 R. S., 133), is not in conflict with Chapter 875, Laws of 1869.

A statute only operates as a repeal by implication of a former one upon the same or a cognate subject to the extent that the two are repugnant; they will both stand to the extent they can be given effect.

This action was brought by plaintiff to recover charges for publishing in his newspaper the official statement and declaration of the board of canvassers of the city and county of New York, in relation to the election for judges of the court of appeals, in May, 1870, which was done in pursuance of a resolution of the board of canvassers.

At the trial the complaint was dismissed on the pleadings, on the ground that the general statute (11 R. S., Edwin's ed., 133, laws of 1847, chap. 240), authorizing the board of county canvassers to designate the newspaper in which to publish these statements had been repealed, as far as related to the county of New York, by the provision of the act, chap. 875, laws of 1869, declaring that the mayor and comptroller shall, from time to time, designate six daily newspapers and six weeklies, but no more in which to publish the proceedings of the board of supervisors,

and all proceedings and notices relating to county affairs.

John S. Lawrence, for applt.

D. J. Dean, for respts.

Held, error; That the board of county canvassers, although composed of town officers, do not meet as such, or to perform an official duty relating exclusively to town or county matters. They organize as a distinct board, for a special service, and have the power to designate the papers in which the results of the election shall be published, and the number of papers in which the publication shall be made, and the expense is, with the other expenses of the election, made a county charge. (1 R. S., 148, § 6.) That there is no repugnancy between the statutes which provide for the support of the government of the county of New York, and the provisions therein for designating the papers for the publication of proceedings of county officers and boards, and the statutory regulations concerning elections, and the publication of the proceedings of election boards; they are not in conflict. That the publication of the proceedings of the board of county canvassers is not among the services for which the mayor and comptroller have authority to select papers; that "county affairs" are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers.

It is not enough to justify the holding a statute repealed by the mere passage of a subsequent statute upon the same or a cognate subject; that within the apparent policy of the later act the prior act might reasonably have been repealed as within the reason of the legislature and fully to carry out the presumed intent of the legislature. Stat-

utes are not adjudged to be repealed upon a conjecture of what the legislature would probably have done had its attention been called to the particular act claimed to have been superseded.

A. statute only operates as a repeal by implication of a former one to the extent that the two are repugnant; if both can stand, and to the extent that they can stand and have effect, such effect will be given to them. (52 N. Y., 83; 47 id., 216; 55 id., 613.)

Judgment of general term affirming judgment of nonsuit reversed.

Opinion by *Allen, J.*; *Miller* and *Earle, J. J.*, dissenting.

SURETY.

N. Y. SUPREME COURT. GEN'L TERM.
FIRST DEPT.

Maria S. Morgan, respt. v. Philemon H. Smith and another, applts.

Decided March 5, 1876.

Damages on breach of covenant in a lease cannot be taken advantage of by sureties, in an action on the lease, without showing the principal to be insolvent.

Where a surety is only induced to become such by an agreement of the landlord to do certain things, and where there is a conflict of evidence on such point, it should be submitted to the jury.

Appeal from judgment in favor of plaintiff on verdict of a jury.

This action was brought against the appellants on their covenants as sureties on a lease. The premises were leased as a carpet store, and derived a portion of the light for the room so leased, by means of a glass floorlight in the room above. The tenants above who held under a prior lease, kept this light covered with a carpet, so that the tenants below were deprived of the

light. It was determined in an action against the tenants for rent that they were entitled to have the damages by means of the obstruction recouped on the rent. By the terms of the lease, the tenants agreed that they would not sublet without the consent of the landlord. Afterwards they entered into an agreement by which the plaintiff, the landlord, was to let the premises for and on account of the lessees, it being also agreed that they and their sureties should be still liable on the lease which was to be in no way affected by the agreement. One of the defendants testified that he only consented to become surety upon the express promise of the plaintiff that the lessees should enjoy the full benefit of the floor light.

John A. Godfrey for resp't.

Wm. Allen Butler for applt.

Held, That the damage to the lessees, by reason of being deprived of the light was no reason for dismissing the complaint; that the lessees only could take any advantage of it unless the sureties should show them insolvent, and then only by way of recoupment, or in a separate action for damages as they should elect. That the agreement that plaintiff should let the premises on account of the lessees was not an alteration of the contract, and could not discharge the sureties.

That as there was a conflict of evidence as to the agreement by which one of the sureties signed the lease, and as, if the jury found his story to be true, there could be no recovery. That question should have been submitted to the jury.

Judgment affirmed as to Philemon H. Smith, and reversed as to William H. Smith, costs to abide the event.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.*, concurring

INSTRUMENT FOR DELIVERY OF GOODS. WHEN A NOTE.

PHILADELPHIA COMMON PLEAS. No. 1.

Gould, *et al.*, v. Richardson, *et al.*

Decided April 22, 1876.

The instruments sued on in this case, held not to be instruments of writing for the payment of money, but contracts for the delivery of lime.

Sur rule to strike off judgment and set aside execution.

COPY OF DUE BILLS ON WHICH SUIT IS BROUGHT.

No 1. Philadelphia, Nov. 14, 1871.

Due Messrs. Gould & Co two hundred (200.00) dollars in lime at 35 cts. per bu. on account of trade received.

(Signed) B. M. RICHARDSON & SON.
\$200. No. 944 N. 9th street

No. 2 Philada., March 14, 1873.

Due Messrs. Gould & Company, lime to the amount of three hundred and ninety six dollars and fifty cents, at thirty-five cents per bushel, delivered in any part of the city.

\$396.50

(Signed) B. M. RICHARDSON & SON.

No. 3. Phila., March 15, 1872.

Due Messrs. Gould & Co. sixty-three dollars (\$63) in lime, at thirty-five cents (35 cts.) per bushel, delivered in the limits of the city of Philadelphia.

\$63.

(Signed) B. M. RICHARDSON & SON.

Held, These are not "instruments of writing for the payment of money," but contracts for the delivery of lime.

When the time or place of delivery is stipulated for, a tender must be made by the debtor in accordance therewith, or the obligation becomes payable in money. So, also, if the article is specific, as a piece of household furniture, though no time or place of delivery is mentioned, it is held deliver-

able presently to the creditor. When, however, neither time nor place is mentioned, and the nature of the article, as building material, is such as to imply a designation by the creditor of the amount required and the place where it is to be delivered, a specific demand is necessary, and there is no default until that is made.

Although, these due bills, therefore, might ultimately be considered as promises to pay money, after specific demand and refusal to deliver lime, they cannot be so treated as at present presented.

Rule absolute.

Opinion by *Biddle, J.*

CONSIGNOR. ACTION AGAINST CARRIER.

N. Y. COURT OF APPEALS.

Thompson, *applt.* v. Fargo, treasurer, &c., *respt.*

Decided December 21, 1875.

Plaintiff having collected certain back pay money from the government as the agent of person claiming to have been soldiers, cannot support an action against a carrier to whom he has delivered it pursuant to his principal's orders; nor will it aid him to show that the consignees' names were not on the government muster rolls; nor that a great length of time has elapsed since delivery to carrier and the consignees have not appeared, nor that consignees were not entitled to receive the money from the government.

This action was brought to recover damages for an alleged failure of defendant to deliver a package of the U. S. Treasury notes received by it for transportation. The money was collected by plaintiff as agent for the consignees for back pay claimed to be due

them as soldiers from the U. S. Government.

It is reported upon a former appeal in 49 N. Y., 188, where the judgment of the court below was reverse and a new trial granted. This court then decided that after plaintiff, who was simply an agent, had, in pursuance of orders of his principals, sent the money in question to them by a suitable and proper conveyance, his duties and liabilities were discharged. That the money when delivered to the carrier became the property of the consignees, and from that time plaintiff ceased to have any title to or interest in it, which would enable him to maintain an action, therefore plaintiff attempted to show that new facts have been developed upon the second trial which are sufficient to lead to a different conclusion. He claims to have established upon the second trial that the consignees were fictitious persons. The referee refused to find such fact.

The main evidence relied upon is the absence of the names of the consignees from the muster-roll of the regiment for their pay in which the money was collected.

E. Van Ness for *applt.*

Beardsley & Cole for *respt.*

Held, That this does not of itself prove conclusively that no such persons ever existed. Proof was also given of the time which has elapsed and the non-appearance of the consignees to claim the money, notwithstanding efforts were made to find them by advertisements and letters.

Held, That this proof was equally inconclusive that the facts proved were not inconsistent with the theory that the consignees might have absented themselves or died, and that the referee

was not bound to find that they were fictitious persons.

Plaintiff claimed that the absence of the names of the consignees from the muster-rolls shows that they could not have been soldiers entitled to the pay which plaintiff collected for them.

Held, That although in such case a fraud must have been perpetrated upon the U. S. Government by plaintiff, who was doubtless innocent, and the guilty authors of it had failed to come forward and take its fruits, that circumstance would not furnish plaintiff any title to the money which would entitle him to maintain an action for it.

It was not material whether the money sent was the identical money received from the government.

Judgment of general term affirming judgment for defendant affirmed.

Opinion by *Rapallo, J.*

CONTRACTS FOR PUBLIC WORK ALTERATION OF.

N. Y. SUPREME COURT—GENERAL TERM
SECOND DEPARTMENT.

Dickinson et al. *respts.*, v. The City of Poughkeepsie, *applt.*

Decided February, 1876.

A board, authorized by law to make contracts by publishing for proposals, and by giving the contract to the lowest bidder, has no authority, after the bids have been opened, to materially alter the contract as advertised by adding a clause thereto, and then award the contract to one of the original bidders, without a new advertisement.

Appeal from a judgment in favor of the plaintiffs and against the city of Poughkeepsie, for \$17,199.54, entered upon the verdict of a jury. Also, from an order refusing the defendant's motion for new trial.

The action was commenced against

The Water Commissioners of the city of Poughkeepsie, as defendants. They interposed an answer, upon which the cause was tried at the Dutchess Circuit, in March, 1874, when the plaintiffs were nonsuited. On appeal from the judgment dismissing the complaint, the General Term ordered a new trial.

Pending the appeal an act was passed, by which the acts under which the water commissioners were organized, were consolidated with the charter of the city as then amended. This act took from the commissioners the power of prosecuting and defending suits, and provided for the enforcement against the city of any liabilities contracted or incurred by the commissioners. The contract upon which the action was brought contained the following clause, not contained in the form of contract annexed to the proposal for bids: "It is further mutually agreed by the parties hereto that for any work not herein classified or defined as to price, and which said contractors may be directed by said engineer in writing to do, the said contractors shall receive and they hereby agree to receive as full compensation for said work the actual cost of the work with fifteen per cent added for wear and tear of tools, superintendence, profits."

After the decision on the appeal, the court substituted the present defendant in the place of the water commissioners, and allowed it to interpose a new answer.

The plaintiffs obtained a verdict, and the defendant appeals to this court.

The water board was created by chapter 333, of laws of 1867. By section 6, subdivision 2, of that act, the water board could contract by publishing for proposals for the work for two weeks, and by giving the work to the lowest bidder. The board did publish the re-

quired time, and did issue proposals on which biddings could be made, and did, as part thereof, refer the bidders to a proposed contract. This contract did not contain the concluding clause. There were three bidders, Messrs. Leary & Co., the plaintiffs, and Robert Nelson. Nelson's bid was the lowest.

Evidence was given by the defendant tending to show that plaintiffs' biddings were changed after the opening of the bids; that some items, not in the proposals, were added by plaintiffs and the engineer; that some were increased and some diminished; that some items were so stated in the form of proposals that no bidding could intelligibly be made; that the second and altered biddings were again changed by plaintiffs and the engineer, by adding work which the water board had expressly refused to award to plaintiffs, amounting to some thousands of dollars. The form of the contract itself was altered so as to require the plaintiffs to keep the work in good order for five months instead of six, as called for by the proposed contract, and paragraph *s* was added under which the claim in question is made.

There is no authority given, and the board possessed no power to authorize or add paragraph *s*. The biddings were called for under a proposed contract, adopted by the board, which did not contain this provision.

O. D. M. Baker, city attorney, for applt.

Nelson, Cook & Thorn, for resp't.

Held, The object of the law is plain: bidders were invited to compete with each other on equal terms.

The other bidders had no notice of this paragraph *s*. With it the plaintiffs are clearly not the lowest bidders. An item of nearly \$15,000 is added to the

contract, with no public biddings. The added clause is of evil effect, and was not authorized by the law.

Judgement and order denying new trial reversed, and new trial granted, costs to abide event.

Opinion by *Barnard P. J.*; *Talcott and Pratt, JJ.*, concurring.

AGREEMENT. APPEAL.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Jonas Phillips, applt. v. *Geo. Pace*, resp't.

Decided May 5, 1876.

An assignment of a charter party may be shown by parol unless it appears that the assignment was in writing.

An appeal must be taken from the denial of a motion for a new trial on the minutes in order to be taken advantage of on an appeal.

A party who pays money in his hands to A., who claims the same, after notice by B. that such money is the property of B., does so at his peril.

Appeal from judgment on dismissal of complaint.

Action brought by plaintiff to recover for breach of a charter party and upon a submission and award. The following facts appeared on the trial.

The defendant chartered the vessel "Maria Pace" to Ruger Bros., who afterwards sold and assigned the charter to Burk & Jerons, upon the agreement of the latter firm to pay to them an advance of one shilling and sixpence sterling per quarter of the freight to be laden on the vessel. Afterwards Ruger Brothers assigned all their interest in the charter party to the plaintiff in payment of \$1,000. They delivered their copy of the charter party to the plaintiff and endorsed over to him a certificate of insurance of \$1,700 on profits of the charter of the "Maria

Pace.' The plaintiff produced these papers on the trial.

When the vessel arrived, Ruger Brothers made a claim against the defendant for a breach of the charter party. That claim was submitted to arbitration, and an award was made against the defendant in favor of Ruger Brothers of \$1,750, which sum the defendant paid May 1st, 1874, to Ruger Brothers, after notice to the agents of defendant to the effect that plaintiff held by assignment the original charter party of the vessel, having advanced thereon \$1,000, and charges to Messrs. Ruger Brothers & Co. on their re-charter of the vessel to Messrs Burk & Jerons, requesting them to withhold the money awarded by the New York Produce Exchange, and pay the same to him.

On the trial, the Judge refused to allow plaintiff as a witness in his own behalf to show that the transfer and assignment of the charter party to him was by parol. The Justice on the trial holding that an assignment of a written instrument, or of any interest under it, cannot be proved by parol.

The justice on the trial dismissed the complaint, on the ground that Ruger Brothers had no interest in the charter; they were simply to get a profit.

A motion was made for a new trial upon the minutes, which was denied, but no appeal was taken from the order denying such new trial.

Mann & Parsons, for applt.

Beebe, Wilcox & Hobbs, for resp't.

Held, That the effect of the transaction between the plaintiff and Ruger Brothers was evidently to transfer to the former all interest of the latter to the charter party, and in the profits

which they were to make thereon under their contract of assignment to Burk & Jerons.

That the ruling of the justice with respect to proof of the assignment was clearly erroneous; for unless the assignment appeared to have been made in writing, it was competent to prove the parol assignment accompanied by the delivery of the papers. But the error of this ruling was cured by the subsequent admission of testimony which proved the delivery of the charter party at the time of the payment of the \$1,000.

The motion for a new trial cannot be considered, as the appeal is from a judgment only.

The plaintiff's right to recover against the defendant, depends altogether upon the fact that the latter paid over to Ruger Brothers, after sufficient notice of plaintiff's rights, the awards which it is claimed belonged to plaintiff.

That no objection seems to have been made to the sufficiency of the notice. Plaintiff showed a *prima facie* right to recover, and it was error to dismiss the complaint on the ground stated, and the exception to the ruling was well taken; for it is apparent that whatever interest Ruger Brothers had in the charter, had been assigned to and was held by the plaintiff upon his advance of \$1,000, and presumptively at least the plaintiff was entitled to the award made to Ruger Brothers for damages sustained by them for a breach of the charter. The judgment must be reversed and a new trial ordered with costs to abide event.

Opinion by *Davis, P. J.*; *Brady and Daniels, J. J.* concurring.

DIVORCE.

N. Y. SUPREME COURT, GENERAL TERM,
FIRST DEPARTMENT.

Megarge, *applt.*, v. Megarge, *respt.*

Decided May, 5, 1876.

On a motion to set aside a judgment of divorce because of adultery, on the ground of fraud and collusion defendant's affidavit is competent, though she might not testify as to her innocence on the trial.

In such a case it is proper to apply by motion instead of by action.

Appeal from order setting aside judgment in an action of divorce, and directing the payment of \$150 by the plaintiff, as counsel fee for defendant in the action.

The parties in this suit desiring a mutual divorce were induced to apply to one W. H. Gale, an attorney, who assured them that he could effect the divorce desired on the ground of abandonment. He was consulted by both the parties, and gave them both advice in the matter.

He informed the wife (the defendant) that it would be necessary for her to leave the State for two or three days in order to commence the proceedings, and advised that she should go to New Jersey. He promised that he would meet her at the New Jersey ferry to give some final advice. Accordingly in the afternoon of November 5, 1874, he met her at the Twenty-third Street Ferry, and said that it would be important for her to first meet a certain active person who would be at the Grand Union Hotel. She accordingly went with him to the hotel, and was shown to a sitting-room up stairs, as he said that it would be better to be in a private parlor free from interruption. On entering he locked the door, as he said to prevent an interruption. He

had in the meantime entered their names in the hotel register, as "James H. Baldwin and wife" He kept her waiting for the "other person" until when it was getting late, she begged him to allow her to go home, this he refused, saying that it was necessary for her to wait for this man in order to effect the divorce, that she should keep quiet, that it would not do to create a disturbance, and that it would be all right, that he was acting in her behalf, and that no harm would come of it if she remained quiet. He tried to induce her to lie down in the bedroom adjoining and rest herself, which she refused to do; but remained sitting up all night. In the morning he unlocked the door, and allowed her to go home. He had in the meantime employed two of his clerks to watch himself and defendant, and to swear to affidavits to the effect that they had seen defendant, on the evening of November 5, 1874, leave Twenty-third Street Ferry in company with a strange man, not her husband, and accompanying him to the Grand Union Hotel, where she remained in a room with him until after 10.30 P.M. Shortly afterwards plaintiff becoming suspicious of Gale, instructed him to stop the proceedings.

Thereupon Gale had an interview with defendant, and by telling her that he believed plaintiff was going to leave the country, and would probably desert her and pay her nothing for her support, finally induced her to apply for a warrant for plaintiff's arrest, because of abandonment.

On plaintiff's arrest Gale tried to induce defendant to insist upon his paying her more than \$600, the amount previously agreed upon for her support, this she refused to do and plaintiff was released.

Incensed at his arrest, plaintiff proceeded with the divorce.

Gale informed defendant that he would send her some papers which she was to receive, but that it was a mere matter of form. He then served upon her the summons and complaint, which she next day brought down to his office without opening or reading. The complaint alleged that defendant had committed adultery with a man named Baldwin on the night of November 5, 1875. On the examination before the referee she was instructed by Gale to say that she had no defence, and that she had received the summons and complaint, and believing that the action related only to the fact of her having abandoned her husband's home, as she had been told it did, she told the referee that she had no defence. During her absence from the referee's office, the prepared testimony relative to her visit to the Grand Union Hotel are given by Gale's clerks.

On the coming in of the referee's report a judgment for absolute divorce against the defendant because of adultery was entered.

Defendant some time after, learning, for the first time, the nature of the judgment and of the charges made against her, applied to the special term, on her own and other corroborative affidavits, setting out the above, which Gale did not attempt to deny, to have the judgment set aside, to be allowed to come in and defend, and for \$150 counsel fee.

Motion granted.

It was urged in opposition that defendant's affidavit was incompetent as evidence on the subject of her own innocence, and further that the relief sought could be obtained only by action, and not by way of a motion to set aside the judgment.

John R. Dos Passos, for applt.

Freling H. Smith, for respt.

On appeal.

Held, That defendant's affidavit was competent, for even where parties could not be witnesses their affidavits were always received upon special motions, and even though she might now be incompetent as a witness, to the same extent, upon a trial of the action, yet that would not justify the exclusion of her affidavit, on an application to set aside a judgment, claimed to have been fraudulently obtained against her. The objection that relief could only be obtained by an action is invalid. The courts have always intervened on motion to vindicate their own process, and proceedings against oppressive, fraudulent, and collusive uses of them.

A more flagrant case of professional misconduct, duplicity, and crime combined, has never been exhibited in any case of this description. The judgment was properly set aside as a cheat and a fraud, and the defendant allowed to contest understandingly the charge made against her in the complaint.

Judgment affirmed.

Opinion by *Daniels J.*; *Brady J.* concurring.

NOTARIAL CERTIFICATE. SEAL. ENDORSER'S PROMISE TO PAY.

N. Y. COMMON PLEAS. GENERAL TERM,

Charles B. Richard and Emanuel Boas, *respts.*, v. Conrad Boller, *applt.*

Decided May, 1876.

To be admissible in evidence a notary's certificate of protest must be under a seal made by an impression directly upon the paper, or upon wafer, wax, or some similar substance, a mere imprint is not sufficient.

An endorser's promise to pay, after maturity of the paper, to be binding

must be made with a full knowledge of all the facts.

This action was brought to recover against the defendant as an endorser of a foreign bill of exchange, drawn by Benno Speyer, at New York, upon Mohr & Speyer, in Berlin, Germany, and claimed to have been protested for non-acceptance, of which protest it was also claimed the defendant had due notice. The protest was attempted to be proved by a notarial certificate. Upon this certificate was imprinted in blue ink, directly on the paper of the certificate, a design or stamp of a notarial seal, but the design of such seal was not impressed on the paper nor upon adhesive substance attached to the paper. The plaintiffs having received said draft and alleged certificate of protest from abroad, sent the same to the defendant, who promised to pay the draft. The plaintiffs recovered in the court below.

Charles N. Hall, for the applt.

Edward Salomon, for the respts.

Held, The first question to be considered is the sufficiency of the proof of the demand and protest of the draft, and this depends upon the question as to whether the design of the notarial seal printed on the certificate of protest is such a seal as would authorize the reading in evidence of the certificate of protest without further proof. It was not contended upon the argument of this appeal that the certificate of protest could be received in evidence unless sealed by the notary.

The whole course of legislation in this State shows that in the absence of statutory provisions a mere impression upon paper was not considered as a sufficient seal. In 1815 the Legislature enacted "that the impression of the seal of any court by stamp, should

be a sufficient sealing in all cases where sealing is required." In 1823 the Legislature also provided "that it should be lawful for certain State officers to affix the proper seal by making an impression directly on the paper, which should be as valid as if made on a wafer or on wax." In 1848 it further enacted "that in all cases where a seal of any court or of any public officer shall be authorized or required by law, the same may be affixed by making an impression directly on the paper as if made on a wafer or on wax;" but the Legislature further says that the foregoing provision "shall not extend to private seals, which shall be made as heretofore on wafer, wax, or some similar substance." And in the same year also enacted that the seal of any corporation authorized as required by law "may be affixed by making an impression directly upon the paper, which shall be as valid as if made on a wafer or on wax." The clear import of these enactments is to authorize the impression of the seal immediately on the paper without the intervention of any wafer, wax, or other similar substance. The impression of the seal can be made directly upon the paper only when the design of the seal is impressed upon the paper itself, and does not require any other substance to exhibit it. In the case now under consideration, the seal being merely an imprint of ink upon the surface of the paper, is neither an impression made directly upon the paper, as required by our statutes, neither is it impression upon a wafer, wax or other similar substance as required by the common law. Various authorities have been cited by the counsel for the respective parties, but none of the cases seem to have any application to the

question now under consideration except the cases of the Bank of Rochester v. Gray, 2 Hill, 227, and *Ross v. Bedell*, 5 Duer 462, and these cases sustain the view I have already suggested. It seems, therefore, that it was error to admit the certificate of protest, it not being under seal, and the judgment must be reversed unless the defendant is bound by the promise which he made to pay after the maturity of the draft. Parsons on Notes and Bills, vol. I., p. 595, lays down the rule, "that a promise to pay after maturity with the full knowledge of laches is binding on the party promising without further proof of demand, protest or notice," and, at page 601, he says, "a mere promise to pay is not sufficient. Plaintiff in each case must go further and prove knowledge on the part of the party promising of the facts." The certificate of protest being excluded from consideration for want of a proper seal, there is no evidence in the case that the draft was ever presented for acceptance or protested for non-acceptance. In considering, therefore, the defendant's promise to pay we must, therefore, assume that the case is presented without any attempt to prove demand or protest. A failure to make a demand would undoubtedly be laches upon the part of the plaintiffs, and a knowledge of such laches must be had by the defendant at the time of making the promise in order that it should be binding. The evidence in this case shows, not only that the defendant had no knowledge of the failure of the plaintiffs to make a demand, but, on the contrary thereof, the promise was made at a time when he supposed that a proper demand and protest of the draft

had been made, and that a proper notice thereof was being given to him. It is clear, therefore, that the defendant had not full knowledge of the facts at the time of making the promise and the same is not binding upon him.

Judgment must be reversed and a new trial ordered.

Opinion by *Van Brunt, J.*

FALSE IMPRISONMENT. DAMAGES. MOTIVE. EVIDENCE.

N. Y. COURT OF APPEALS.

Voltz, respt., v. Blackmar, applt.

Decided March 21, 1876.

In an action for false imprisonment where exemplary or punitive damages are claimed all the circumstances connected with the transaction tending to explain the motive of defendant, are admissible in evidence.

This action was brought to recover damages for an alleged false imprisonment, and assault and battery. It appeared that plaintiff was the clerk of defendant who resided at Buffalo, and had a power of attorney authorizing him to draw checks for defendant, and was conducting his business in New York City. He had been employed at a fixed salary by the year, and his employment ended under his contract Sept. 1, 1873. Defendant wrote to him August 29, 1873, that his services would not be required another year, but expressed a desire that he should remain in New York until September 15th. He remained until Sept 6th. On the 5th without plaintiff's knowledge or authority he drew \$4,000 from the bank on a check signed by him with defendant's name, and deposited it to his own credit, taking therefor a certificate of deposit, payable to his own order. He then tele-

graphed defendant that he had drawn a check for \$4,000 "my account." Defendant then owed him \$3,000 for borrowed money, and \$200 for balance of salary. Plaintiff alleged that he drew the check to pay for the borrowed money and arrears of salary due him, including the whole month of September. At the time plaintiff held defendant's note for \$3,000 for the borrowed money. Defendant came to New York immediately, reaching there on the 6th, and found plaintiff at the office, and demanded that he should return the money, which he refused to do, and he therefore discharged plaintiff. The latter went to the safe in the office and took from it an envelop containing the certificate of deposit for \$4,000, some private papers of his own and bank vouchers, and three negotiable warehouse receipts for about 5,000 bushels of malt worth \$50,000 representing malt, which belonged to defendant, held in store for him in New York, and deliverable on production of the receipts indorsed by him. Plaintiff put these papers in his pocket and left the office. Defendant testified that after plaintiff had gone, another clerk informed him that plaintiff had taken the receipts and papers, and this was the first knowledge he had of the fact. Police officers were sent for and plaintiff having returned, defendant demanded the papers of him, and he refused to surrender them. Plaintiff testified that he offered to return them if defendant would receipt them to him. This was denied by defendant. Plaintiff was arrested and placed in a cell at the station house where he remained until the next morning, when he was discharged on the ground that the matter was of civil and not of criminal

cognizance. Plaintiff testified that after he had taken the papers, he said to defendant "I shall go to Buffalo to settle my matters." It appeared that the plaintiff knew that defendant was a man of wealth, and that debts against him were collectible. The judge having charged that the jury were at liberty to give vindictive damages, was requested by defendant's counsel to charge that. "There is no justification offered in the case for the plaintiff's possession of the malt-house receipts." The court in reference said, "I say the private rights of these parties are not before the jury," and defendant's counsel excepted.

Asher P. Nichols for applt.

John T. Hoffman, & William. H. Gurney for respts.

Held, That the facts in respect to the taking of the warehouse receipts were proper to be considered by the jury as bearing upon the defendant's motive, and as the charge withdrew material facts tending to mitigate the damages from the consideration of the jury, it was erroneous.

Where exemplary or punitive damages are claimed, all the circumstances immediately connected with the transaction tending to explain the motive of defendant are admissible in evidence.

Judgment of General Term, affirming order, denying a new trial, and affirming judgment on verdict reversed and new trial ordered.

Opinion by *Andrews, J.*

TRUSTEE. ACCOUNTING. ASSIGNMENT OF CAUSE OF ACTION.

N. Y. COURT OF APPEALS.

Helms, *applt.*, v. Goodwill, *respt.*
Decided March 21, 1876.

The period of the performance of his duty having passed, and there being no possibility of further performance, a trustee is bound to account for the trust estate, and is liable for any loss to it by his misfeasance or neglectful non-performance.

In such case an action for an accounting will lie, although no damages or fraud is proven.

An assignment of all claims, demands and causes of action legal or equitable, passes to the assignee a right of action for an accounting against a trustee.

In 1868, H., plaintiff's assignor, was the equitable owner of thirty acres of land. The legal title was held by the executors of C., and they brought an action to foreclose the contract of purchase under which H. held the land, and also an action to recover the value of certain personal property. H. employed defendant and his partner J. as his attorneys to defend said action, and they appeared and conducted the defense of the same. While these actions were pending H. and said executors had an accounting, and the latter agreed that if H. would pay them a certain sum they would convey the land to him. H. agreed to sign the contract of purchase to defendant, the latter agreeing to take a deed of the premises and to hold them in trust for H. and give a mortgage to pay the executors, and lay out the land into village lots, and sell enough lots to pay the mortgage, and convey the remainder to H.; and in consideration thereof defendant was to receive for his services, if he would build a house thereon, one and one-half acres of the land, he paying \$100 thereon by applying the same on a note given defendant's firm for their services in said

action. The contract was signed in accordance with the agreement, and the premises deeded to defendant, who entered into possession of one and one-half acres thereof and built a house thereon and occupied the same; the remainder he mortgaged for \$2,500, out of which sum he paid the executors and other debts of H., amounting in all to \$2,300. Defendant did not lay out the land in lots or sell any lots, and the mortgage remaining unpaid was foreclosed, and the land except the one and one-half acres sold thereunder. The court upon the trial found the facts stated above. It also appeared that the land upon the foreclosure sale brought about \$600 more than the amount of the mortgage, as a conclusion of law that defendant should pay plaintiff the value of one and one-half acres of the land, less the \$100 already paid and the \$200 received by defendant upon the mortgage, less \$28.18 deficiency arising on the foreclosure sale which defendant was obliged to pay.

W. H. Henderson, for applt.

Frank W. Stevens, for respts.

Heid, No error; that as it was not found, and did not appear, that H. knew that the deed was made absolutely to the defendant with no declaration of the trust therein, that by that transaction a resulting trust was created in favor of plaintiff, 18 N. Y., 515—to wit: to raise money by the mortgage, with the money to pay creditors, to pay the mortgage by a sale of the lands, and to pay to H. for the surplus or residue, and thus the latter attained an interest in the subject assigned, and defendant had an active duty to perform as to that interest, and the period for the performance of the duty having passed, and the possibility of fur-

ther performance gone by, defendant was bound to account for the estate and liable for any loss to it by his misfeasance, or neglectful non-performance. *Quinn v. Van Pelt*, 56 N. Y., 417 distinguished. That defendant was liable to the amount found, the \$200 being moneys belonging to plaintiff, and the evidence warranted a finding that defendant by reasonable exertion could have sold the land so as save the \$600.

This action could be maintained although no damages were proven, and although the management of the estate had been correct, as a demand for an account of equity. It was not necessary to establish fraud.

Also held, That an assignment by H. to plaintiff of all claims, demands and causes of actions, legal or equitable against defendant, passed to plaintiff a right of action for an accounting in regard to the trust estate.

Order of General Term, reversing judgment in favor of plaintiff reversed, and judgment affirmed.

Opinion by Folger, J.

EVIDENCE. EXCESSIVE DAMAGES.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Cleghorn, respt., vs. The N. Y. C. & H. R. R. R. Company, *applt.*

Decided January, 1876.

Evidence that defendant's agent knowingly employed a switchman who was intemperate and incompetent is admissible on question of positive punitive damages. Courts rarely exercise this right to grant a new trial on the ground of excessive damages.

This action was for damages received

by plaintiff resulting from an accident caused by a misplaced switch.

It had been once tried, and been to the Court of Appeals.

The Court of Appeals held that evidence offered by plaintiff as to the previous intemperance of the switchman, and that this previous intemperance was known to defendant's agents, was competent.

On the present trial the same evidence was offered and received, and tended to show that the conduct of defendant's agent entrusted with the power of employing and discharging subordinate employees for defendant was in this instance grossly negligent. The jury were instructed that they might give punitive damages. Defendant's counsel insisted that the question of negligence was determined, and proved, if at all, without this evidence, and the only object and tendency of the evidence as to previous habits was to inflame the minds of the jury against the defendants.

Plaintiff had a verdict for \$7,000.

Held, 1. That the evidence being admissible in degree no exception would lie to its reception on the ground of its insufficient force or weight to establish the fact of culpable negligence. The evidence being admissible, it was not the duty of the Judge to instruct the jury to disregard it.

2. That the power to grant a new trial on the ground of the excessiveness of damages is possessed, but rarely exercised by the Court, and plaintiff's injuries having been severe and having disabled her for many months and may be permanently, the verdict should not be disturbed.

Judgment affirmed.

Opinion by *Smith J.*; *Mullen, P. J.*, and *Gilbert J.*, concurring.

PARTNERSHIP SETTLEMENT.

N. Y. SUPREME COURT. GEN. TERM.

FOURTH DEPARTMENT.

Augsbury *applt.* v. Flower, *respt.*

Decided January, 1876.

Where partners have settled and liquidated their accounts Courts of Equity will not open them except upon clearly proved allegations of fraud or mistake.

This action is an equitable one to settle partnership accounts.

The parties in Oct. 1859 engaged in the purchase and sale of butter, and during that Fall sent to New York and Boston a large quantity of butter purchased principally with moneys borrowed for that purpose on drafts upon their consignees and promissory notes discounted at county banks upon their joint credit and responsibility.

The referee found that in February, 1861, the parties met for a settlement of their transactions, and that on this occasion the defendant stated the loss of the partnership at about \$4,000, and also at this time sold and conveyed real estate to plaintiff, and gave other security to pay his proportion of such loss, and the plaintiff then assented to pay the debts of the firm, and released the defendant from such debts as were specified in a certain receipt.

The referee also found that when this arrangement or settlement was made or entered into the plaintiff knew, or was in a situation to know, what amount the defendant had paid on the partnership debts, and as there was no direct proof of mistake or fraud he dismissed the complaint.

L. J. Dorwin, for the *applt.*

B. Winslow, for the *respt.*

Held, That where parties have settled and liquidated their accounts courts of equity will not interfere to open them,

except upon clearly proved allegations of fraud or mistake.

That the presumption in all such cases is in favor of the correctness of the accounts, and that the parties were possessed of ordinary capacity and intelligence, and competent to take care of their own interests.

If palpable errors are charged and proved, errors which are clearly the result of imposition, mistake or fraud, the account may be so far opened as to correct such mistake or error. The burthen is on the parties alleging the error to prove it.

The plaintiff having failed to show that there was any fraud or mistake in the accounts and settlement, the judgment of the referee is right, and must, therefore, be affirmed.

Judgment affirmed.

Opinion by *Smith J.*; *Mullin P. J.* and *Gilbert J.*, concurring.

TESTAMENTARY CAPACITY.
INQUISITION LUNACY. EVIDENCE.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Decided January 1876.

Searles *et al*, Executors, *applt.* v Harvey and others, *respts.*

In proceeding to have a will admitted to probate, an inquisition of lunacy previously found raises a presumption of testator's incapacity, which it requires some evidence to overcome.

This is an appeal from an order of the Surrogate of Jefferson County, refusing to admit a will to probate.

The appellants are executors.

Prior to testator's death, and on or about January 1873, an inquisition of

lunacy was found, and such inquisition found, that at its date, and for more than two years then last past, testator was of unsound mind and incapable of doing business. This date took his incapacity back to a time prior to the execution of the will in question.

J. Mullen Jr., for applt.

Hubbard & Watts for resp't.

Held, That such inquisition is not conclusive evidence of the incapacity of the testator to make a will. It is only presumptive evidence of such incapacity, but some evidence is necessary to overcome such presumption. The evidence given on the hearing before the Surrogate was insufficient for this purpose.

Order of Surrogate reversed.

Opinion by *Smith J.*; *Mullen P. J.* and *Gilbert J.* concurring.

INJUNCTION. FRAUD.

N. Y. SUPREME COURT. GENERAL TERM.

FOURTH DEPARTMENT.

The Globe Mu. L. Ins. Co., *resp't.*, v
Reals et al, *appls.*

Decided January, 1876.

Equity may decree the delivery up and cancellation of deeds and other writings procured by fraud, and will enjoin their transfer or disposition pending the suit.

This is an action in equity to set aside a policy of insurance upon the ground that its possession was obtained by fraud.

At the commencement of the action an injunction was granted restraining the defendant from transferring the policy, with an order that the defendants show cause why such injunction should not be continued. On the return of the order the injunction was

dissolved. The defendants then demurred to the complaint. The demurrer was brought on for argument at special term and overruled. The plaintiff duly appealed from the order dissolving the injunction, and the defendants duly appealed from the order overruling the demurrer.

Both appeals were brought on for argument together.

Robert, for plaintiffs.

Hiscock, Gifford & Doheny, for defendants.

Held, 1. It is the settled doctrine of the Courts of Equity that deeds and other contracts fraudulently obtained may be set aside or ordered to be delivered up and cancelled. The complaint in this action set up a proper case for the exercise of the equitable power of the court, and the demurrer to said complaint was properly overruled and the order should be affirmed.

2. The order dissolving the injunction was doubtless granted upon the assumption that the plaintiff had a proper remedy at law, and that the complaint did not in this view state facts sufficient to constitute a cause of action.

The decision upon the demurrer disaffirms this view of the law of the case, and involves a reversal of the order dissolving the injunction and a restitution or revival of the same.

The order dissolving the injunction should therefore be reversed and the injunction restored, with costs of the appeal and the order overruling the demurrer should be affirmed, with costs of the appeal.

Opinion by *Smith, J.*; *Mullin, P. J.*, and *Gilbert, J.*, concurring.

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VILLAGE TRUSTEES. POWER
TO CONTRACT DEBTS.N. Y. SUPREME COURT—GEN'L TERM.
THIRD DEPARTMENT.Gamble, *respt.*, v. Village of Watkins, *applt.*

Decided May, 1876.

Village trustees have no power to contract debts for entertaining editors visiting the village.

Appeal from a judgment in favor of plaintiff, for a debt contracted in entertaining a company of editors visiting Watkins.

Held, That the defendants had no power to appropriate moneys for such purpose. (*Hodges v. Buffalo*, 2 Denio, 110.)

It is said that the expenditure was repaid by subsequent editorial puffs, but it is not proper for trustees to hire editors for such a purpose. If it had been shown that the editors were paupers there might have been some propriety in keeping them from starving.

Judgment reversed with costs.

Opinion by *Learned, P. J.*; *Bockes*, and *Boardman, J.J.*, concurring.

AGENCY. EVIDENCE. EXCEPTIONS.

N. Y. SUPREME COURT—GENERAL TERM
FOURTH DEPARTMENT.Abel, *respt.*, v. Seymour, *applt.*

Decided January, 1876.

Authority by a father to a son to endorse notes, &c., need not be expressly proved; it may be proved by implication or custom. Exceptions to evidence.

This action was on a promissory note endorsed in defendant's name by his son. It was proved that the son

had general charge of defendant's business; had endorsed other notes in defendant's name, which defendant without objection paid. The son lived in the same house with defendant. The note in suit was a renewal of an old one. The note was once shown to defendant, and he said, "I will see to it." He never repudiated any endorsements on this, or other notes, until his son ran away.

It was also proved, under objection, that when the note was made the son signed the it and then said, "I will go and get father's name on the back," and that while he was gone, witness heard him conversing with some one, and that he (witness) recognized the voice as defendant's. Defendant's wife negotiated one of the notes, endorsed by the son in defendant's name.

There was judgment for plaintiff before the referee.

George N. Kennedy for *applt.**Wm. C. Ruger* for *respt.**Held*, The referee did not find that the endorsement sued on was made by the defendant, but did find that it was made by his authority. No direct evidence of his authority was given on the trial, nor was evidence of that kind necessary to warrant the finding. According to the evidence given on behalf of the plaintiff, the defendant had been accustomed to assume the liability of an endorser of a promissory note where his name had been written by his son, and he thereby adopted the endorsements so made. He did not deny the endorsement in this case until after his son had absconded, but impliedly admitted his liability upon it. Such acts unexplained are conclusive against him. (*Barber v. Gingell*, 3 E-p., 60; *Hartford Bank v. Hart*, 3 Day, 491. *Weed v. Carpenter*, 10 Wend, 403; *Butler*

v. Stocking, 4 Seld., 408; Prescott v. Flinn, 9 Bing., 19.) The evidence given by the defendant amounted to a denial of the facts from which his assent to the acts of his son might be implied, and at most only raised a question of fact on this point, and we are unable to perceive any reasonable ground for disturbing the conclusion of the referee upon it.

Several exceptions were taken to the admission of declarations and transactions with Ira B. Seymour. They were received upon the ground that he was the agent of the defendant in respect to the matter in controversy. They had no bearing on the case whatever, unless such agency was established. It is not necessary to decide whether the agency proved, included an authority to endorse notes. If it did, the evidence was competent as part of the *res gestæ*. If it did not, the evidence was wholly immaterial, because the defendant, nevertheless, is liable upon the ground before stated. The same remark is applicable to the evidence respecting the defendant's voice. We would not, therefore, be warranted in reversing the judgment, even if the evidence was erroneously admitted.

With respect to the conversation had with the defendant's wife, it sufficiently appears that it was had at his instance and in his behalf.

Our opinion is that the judgment should be affirmed.

Opinion by *Gilbert, J.; Mullin, P. J.*, and *Smith, J.*, concurring.

ASSESSMENT. CONTRACTOR'S BOND.

N. Y. SUPREME COURT—GEN'L TERM.
FIRST DEPARTMENT.

Amos R. Eno, *applt.*, v. The Mayor, &c., *respt.*

Decided May 5, 1876.

The Legislature may prescribe the form of proceedings in any court, such an act would not be limiting their jurisdiction.

Where a first contractor fails to complete the work, and it is subsequently completed at an increased expense, the city cannot be restrained from collecting the assessment until it has sued on the contractor's bond, for such increased expense.

Appeal from order of the special term sustaining demurrer to the complaint.

In 1868 a resolution was passed by the Board of Aldermen of New York City authorizing the grading, curbing, &c., of Seventy-seventh Street, from Ninth Avenue to the Boulevard, and the contract was given to one Moore, who agreed to do the work for a certain stipulated price, and gave a bond with sufficient sureties for the proper performance of this work. In 1871 he abandoned the work, which was afterwards undertaken by a second contractor, but at an increased price.

The expense of the work was assessed upon the property along the line, including that of plaintiff.

Plaintiff seeks by this action to have this assessment vacated, on the ground that the proceedings were not properly advertised, and the lien discharged as a cloud upon his title.

Also, that defendants be stayed from further proceedings thereunder, until they have prosecuted the bond of Moore, for the increased price which they were obliged to pay, because of his failure to complete his contract, and until they have applied the proceeds derived therefrom to reduce the entire assessment.

Defendants demurred to the complaint because:

1. This court has no jurisdiction of the subject.

2. That the complaint does not state a cause of action.

Relying upon *Lennon v. Mayor*, 55 N. Y. 366, and chap. 312 laws of 1874, which provides that no suit or action in the nature of a bill of equity or otherwise shall be commenced to vacate any assessment or to remove a cloud upon title, but that property owners shall be confined in their remedies, to proceedings under the act amended. On these authorities the court below sustained the demurrer. On the argument of the appeal counsel urged that the Act of 1874 was unconstitutional, as abridging the jurisdiction of the supreme court. That the court of appeals did not really pass upon this subject in *Lennon v. Mayor*, as that case came from the common pleas, which being of inferior jurisdiction might be limited or deprived by the Legislature of jurisdiction in cases like the one at bar; but that if the act properly governs this court still the complaint is not demurrable since it seeks a further relief not contemplated by the statute, viz.: that the defendant be required to prosecute the bond, and that the form of the remedy was not raised by the demurrer.

Irving Ward for the applt.

D. J. Dean for the resp't.

On appeal

Held, That this is very plainly a "suit or action in the nature of a bill in equity," and is prohibited by the act of 1874, if that act be valid. It is a mistake to suppose that the act deprives this court of any jurisdiction. It simply restricts suitors to a particular form of proceeding in the court, to obtain remedies which before may have been given

by "suit or action in the nature of a bill in equity."

There is no provision in the Constitution that prevents the Legislature from prescribing the *form* in which remedies shall be prosecuted in this or in any other court.

There seems to us to be no reason for the distinction sought to be made between this court and court of common pleas in this regard. When the legislature simply seeks to regulate the mode of procedure in obtaining a remedy, its powers are the same over all the courts of the States.

We do not think that upon the facts shown, any right of action exists by which plaintiff could compel defendants to sue upon the bond of the former contractor before collecting the assessment. To allow actions of that character to be maintained would be to subject public improvements to delays and embarrassments greatly prejudicial to the interests of the public.

The objection to the demurrer, that it does not raise the question of the form of the remedy does not apply. The demurrer was in the general form, that the complaint did not state a cause of action that was sufficient; for the statute provides, that on the facts that appear in the case an action cannot be maintained in the form herein adopted.

Order affirmed.

Op'nion by *Davis, P. J.*; *Brady*, and *Daniels J. J.* concurring.

JUDGMENT. LIEN. SURETY. SUBROGATION. EQUITIES.

N. Y. COURT OF APPEALS.

Barnes et al., respts., v. *Mott*, impl'd, &c., *applt.*

Decided March 21, 1876.

A bona fide purchaser without notice, of real estate, upon which there is lien by judgment, although not technically surety for the judgment debtor, occupies a similar position, and if the judgment is stayed by an undertaking on appeal, a release by the judgment creditor of the sureties on the undertaking on appeal, will operate to discharge the judgment lien upon the land, and support an action to restrain a sale thereof upon execution.

This action was brought to restrain by perpetual injunction the sale of a house and lot under an execution upon a judgment recovered in 1864, against Britton & Binninger. Plaintiff, H. B. B., is the present owner by a conveyance from one L., in 1873, the other plaintiffs are the grantors to L. Defendant M. holds the judgment by assignment from defendant W. It appeared that when the judgment was recovered Britton owned the premises, and afterwards, in October, 1864, conveyed them, subject to a mortgage thereon, to one Burr, with full covenants and warranty, who paid the full price in ignorance of the judgment, and took immediate possession. Burr died in 1865, having devised the property to his children, who payed off the mortgage and conveyed them to L. in ignorance of the judgment, with full covenants and warranty, who also paid the full price therefor. When the property was conveyed to Burr, an appeal from said judgment to the general term was pending, with an undertaking staying execution. The judgment was affirmed October 23, 1868, an appeal was taken to the court of appeals. On this latter appeal, the defendants, W. and D., executed an undertaking whereby all proceedings were stayed during the pendency of the appeal. The judgment was affirmed in January, 1873,

and Britton having become insolvent, and Binninger having died, leaving no assets, an action was commenced against W. and D., upon their undertaking. They were defended by defendant Wagner, who, in March, 1873, settled with the owners of the judgment and took an assignment of it to himself, and obtained a discontinuance of the action against the securities. A day or two after, Wagner executed a release under seal, to W. and D., releasing them from all liability on their said undertaking, and assigned the judgment to defendant M., who had an execution issued.

Addison Brown, for respt.

W. F. Shepard, for applt.

Held, That plaintiffs, as successor in interest of Burr, Britton's grantee, occupied the same position, and have the same rights and equities he would have had if he had continued to own the premises; that plaintiffs were not technically sureties for the judgment debtor, but occupied a similar position, and were entitled to the same equities, so far as they could be administered consistently with the rights of others; that they might, as grantees of the land with covenants against incumbrances, at any time, but for the stay of appeal, have paid off the incumbrance, and had their action for the full amount paid (4 Mass., 627; 18 J. R., 105; id., 358; 10 Wend., 142); and upon payment thereof they would have been subrogated to all the rights of the judgment creditor, and to all the securities he held for the payment of the judgment (Story's Eq. Jur., § 227; 8 Barb., 534; 42 N. Y., 89; 17 Ves., 12; 2 Vern., 608); that plaintiffs succeeded to the remedies the judgment creditor would have had against the sureties upon the appeal; that the sureties upon

the appeal having intervened as volunteers, and by their interposition got time for the principal debtor, to the prejudice of the prior sureties and of plaintiffs, they must be considered in equity as any other sureties, and their obligation enured to the benefit not only of the creditor, but of any and all who had become before them in any way sureties for the payment of the debts, and plaintiffs were entitled to the benefit of their undertaking, and the discharge of it without their consent, was, in equity, a discharge of their property from the lien of the undertaking (1 W. & S., 155; 5 id., 352; 1 P. & W., (Penn.) 395; 49 Penn. St., 23; 58 N. Y., 563; 2 Vern., 608), and they were entitled to the relief demanded.

Judgment of general term affirming judgment of special term for plaintiffs, affirmed.

Opinion by *Allen, J.*

PARTITION.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Chapman et al., respt., v. Cowenhoven imp'd, &c., applts.

Decided May 5, 1876.

An estate in fee, not subjected to any life estate, though subject to the possession of trustees, for the purpose of executing certain trusts, is a sufficient possession to uphold an action for partition.

Appeal from order overruling demurrer to the complaint.

One Garretta Cowenhoven died seized of the property sought to be partitioned by this suit, and by her will devised one undivided third thereof to each of her children, Tunis, Nicholas, and Matilda for life, remainder to their heirs. Tunis and Matilda have both died. The share of

Matilda has, by certain *mesne* conveyances become vested in the plaintiffs.

The life estates are given by the seventh clause of the will.

The sixth clause, however, provides that the executors shall rent this property, and pay from the rent so received certain specified legacies. That after their payment they shall pay a third of such rent remaining unto the three children named, until all the trusts are completed.

The eighth clause provides that if either of said children shall die leaving issue, that said issue shall stand in their parents stead taking *per stirpes* and not *per capita*. Defendants demurred to the complaint in partition on the ground that Nicholas Cowenhoven being still alive the trusts mentioned in the sixth clause of the will were not yet completed, that until they were, plaintiffs could not show such an interest as would entitle them to proceed in this action; the possession of the whole being in the trustees, for the purpose of executing the trusts.

Demurrer overruled.

Wm. J. Sayres for the respt.

H. C. Place for the applt.

On appeal

Held, That although by the provision of the will the legal title is vested in testatrix's children, yet the trustees are entitled to possession under the sixth clause of the will as a necessary incident to the carrying out of the trust, and it would seem by the eighth clause that the testatrix intended that the trust should continue until the last of the three children had died. And this point is raised as an objection to plaintiff's right to maintain the action for partition.

Plaintiffs are, however, seized in fee of the interests, which they claim to have derived from the children of Matilda, and their estate is subject to no existing life estate, although, if the trust is valid, it may be subject to the right of possession in the trustees for the purpose of continuing to execute the trusts created by the will. Having such an estate they are, according to the views expressed by Denio Ch. J. (in 15 N. Y., 623), entitled to be regarded as having sufficient legal possession to uphold their action for partition.

Order affirmed.

Opinion by *Davis P. J.*; *Brady*, and *Daniels J. J.* concurring.

LIFE INSURANCE. FALSE ANSWER TO QUESTION. ACT OF AGENT.

N. Y. COURT OF APPEALS.

Baker, applt., v. Home Life Ins. Co., *respt.*

Decided March 21, 1876.

A false answer in an application for life insurance avoids the policy, whether the insurer knew its falsity or not, if the answer is a material one

If a true answer is given by the applicant to the company's agent who reduced the answer to writing, and in so doing modified or varied its meaning, the company is estopped from challenging its correctness.

This action was brought by plaintiff, upon a policy of insurance, upon the joint lives of himself and wife, the latter having died.

The application for insurance contained this clause: "It is agreed that the answers to the annexed questions shall be the basis, and form part of the policy granted on this application, and if the

same be not in all respects full, true, and correct, the said policy shall be void, and all moneys paid on account thereof forfeited." One of the questions annexed was: "Have the parents, uncles, aunts, brothers or sisters of the party been afflicted with insanity, consumption, or with any pulmonary, scrofulous or other constitutional disease?" The answer was "No." It appeared that a brother of deceased died of consumption. There was evidence that the mother, one or more brothers, and one or more of the sisters of the deceased had been afflicted with pulmonary and scrofulous diseases, and had died from their effects.

A. M. Bingham, for applt.

L. A. Hayward, for respt.

Held, That this fact, whether known to the applicants or not, at the time the policy was applied for it avoided the insurance.

Plaintiff proved that the deceased, when the application was made, told defendant's agent that she had been informed that one of her brothers had died of consumption. This was denied by the agent.

Held, That if this brother had been the only member of the family who had died of consumption, there might have been a question of fact for the jury, whether the fact that he had died of consumption had been communicated to defendant's agent. But the explanation claimed to have been given in regard to this brother's death did not cure the vice of the warranty as to the others.

Also held, That if true answers were given by the applicant to the defendant's agent, who filled out the application and reduced the answers to writing and the latter modified or varied the answers so as to give them a differ-

ent meaning from the answers given by the applicant, defendant would be estopped from challenging the correctness of the answers as modified, and written by its agent; and the answers nominally proceeding from the insured would be regarded as the act of the insurer. (13 Wall. 222; 21 id., 152; 36 N. Y., 550.)

Judgment of general term, affirming judgment of nonsuit, affirmed.

Opinion by *Allen, J.*

EASEMENT. LIGHT AND AIR. LEASE.

N. Y. COURT OF APPEALS.

Doyle et al. applts., v. Lord et al., respds.

Decided March 21, 1876.

The lease of a building in the rear of which is a yard, from which the lessee receives light and air passes the use of the yard as an appurtenant, and an action may be maintained by the lessee restraining any interference with or obstruction of the easement so acquired.

This action was brought to restrain the defendants from excavating in a yard, for the purpose of building an addition to certain premises which had been leased by them subject to a lease of a portion of them held by plaintiffs. It appeared that in July, 1870, upon the premises was a building, the lower story of which was occupied as a store, and the upper stories by families. The space of 19 feet in the rear of the building was vacant except privies thereon, and there was no communication with any street. There was a hallway on the north side of the building with a door at each end giving access to the yard, and a door from the lower story into the hall, and also from the rear of the store into the yard, and two windows in the rear of

the store through which the light and air entered. It was proved that the tenants had access to the yard and the privies. While the premises were in this condition the first story was leased to plaintiff as a dry goods store for four years. At that time plaintiffs occupied a store the rear of which adjoined the rear of the premises in suit, and it was agreed that the doors opening from the store into the hall and yard should be bricked up to make a place for shelves, and an opening made in the rear wall so as to make a communication between the two stores. Plaintiffs did not use the privies in the yard as they had one in their other store. On May 1, 1874, defendants leased the whole of the premises in suit for ten years subject to plaintiffs lease, and commenced the excavation complained of.

A. J. Vanderpoel for the applt.

T. D. Pelton for the respdt.

Held, That when plaintiffs took their lease the use of the yard passed as an appurtenant, and they acquired an easement therein, and although they had the doors leading from their store into the hall and yard closed, and did not use the privy therein, they were under the terms of their lease entitled to enjoy the light and air which passed in through their windows from the yard (19 Wind., 315, 2 Sandf., 316, 10 Barb., 537, 19, Ohio St., 135, 33 Penn. St., 368, 115 Mass. 204), and that, therefore, the action was maintainable.

Judgment of general term affirming judgment dismissing complaint reversed, and new trial granted.

Opinion by *Earle, J.*

REMOVAL OF CAUSE TO U. S. COURT.

N. Y. COURT OF APPEALS.

Vose, respt. v Yulee, applt.

Decided March 21, 1876.

Under the act of 1866 (14 U. S., S. at Large 306) a cause cannot be removed from a state to the U. S. Court, where there is but a single defendant.

After trial, appeal and reversal, it is too late to remove under the act of 1789.

A party seeking to remove a cause must comply strictly with the statute.

This action was commenced originally against defendant and several others upon a joint application in equity. The complaint was dismissed at the trial as to all the defendants, which judgment was affirmed by the general term and by the Court of Appeals as to all the defendants except Y., the present defendant, and reversed as to him and a new trial granted (50 N. Y. 369). After the remittitur had been sent down and made the judgment of the Supreme Court, Y. filed a petition to remove the case into the Circuit Court of the United States under the act of 1866 (14 U. S., Stat. at Large, 306), which provides for a removal in case the action is against more than one defendant, one of whom is a citizen of a state other than the one in which the suit is brought, and as to whom a final determination of the controversy as to him may be had without the presence of the other parties.

Frank W. Stevens, for respt.

W. H. Henderson, for applt.

Held, That Y. being the only defendant at the time the attempted removal was made, the cause could not be removed under the act of 1866 legally; it was too late to apply under the act of 1789; also that the claim in the original action being against all the defendants upon a joint liability in equity, the

removal could not have been made in the action as it originally stood.

Also held, That a state court will not oust itself of jurisdiction unless a plain case is made. The party may apply to the U. S. Court for a mandate staying proceedings in the state court, and if he omits to do this he must at least show that he has strictly complied with the statute, 49 N. Y., 238.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Church, Ch. J.*

BREACH OF WARRANTY. MEASURE OF DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM,
THIRD DEPT.

White v. Trustees of the Shakers.

Decided May, 1876.

A religious society, given by the legislature power to appoint trustees to hold its property, with right of succession to the trustees, are a corporation, and the property of the society is liable for the contracts of such trustees.

Where admissions are competent against the society on an executory contract for the sale of "large Bristol cabbage" seeds, there is an implied warranty that the seeds sold will produce "large Bristol cabbages." The measure of damages is the loss sustained by the failure of the crop.

The defendants, by their trustee, sold seeds, which, with few exceptions, produced worthless plants.

Action brought against all the trustees for breach of warranty

The defendants were a religious society, called Shakers, who had adopted a covenant, and among other things, by it appointed certain persons trustees of the temporalities, to transact business. These trustees issued declarations of

trust as to the manner in which they held the property of the society. By acts of the legislature the legal estates were confirmed to them and their successors perpetually, and power to appoint trustees was given to the society by said acts.

Lyman Tremain, for applt.

E. Cowen, for resp't.

Held, That the trustees were a corporation, and analogous to trustees of religious corporations, and that the property of the society was liable for their contracts in the ordinary course of business. Articles of association, though signed by many, may be introduced without proof of execution, where they are produced on a trial, upon notice; and where there are subscribing witnesses they need not be called where the party producing the instrument claims a beneficial interest under it.

On an executory contract for sale of "large Bristol cabbage" seed, there is an implied warranty that the seed will produce "large Bristol cabbages." Evidence that seed grown on the stock of Bristol cabbage, though fructified by the pollen of red cabbage would be Bristol cabbage seed, held properly excluded.

The measure of damage is the loss sustained by the failure of the crop. (*Passenger v. Thorburn*, 34 N. Y., 364.)

Opinion by *Learned P. J.*; *Bockes* and *Boardman, J.J.*, concurring.

FEES OF COUNTY CLERK FOR RECORDING AND SEARCHING.

N. Y. SUPREME COURT, GENERAL TERM.

FOURTH DEPARTMENT.

Cartiss as Executor, &c., *applt.*, v. McNair, *resp't.*

Any agreement, express or implied, to pay a county clerk more than the

statutory fees for recording a deed, mortgage or other homogeneous instrument is illegal and void; nor can this result be evaded by means of an account stated.

The fees of county clerk for searching are governed by the Revised Statutes, and not by the Act of 1840, chap. 342.

Fees stated and the statute construed.

The plaintiffs testator was the County Clerk of Livingston County, and had recorded certain deeds, etc., and made searches for defendant, and had rendered to defendant an account for his services. Defendant had paid a portion of the account, and this action was brought for the balance. There was a judgment dismissing plaintiff's complaint.

S. Hubbard, for the applt.

S. J. Bissell, for the resp't.

Held, We have confined our consideration of this case to the questions relating to the charges for recording deeds and those for searches. The fee provided by statute for recording instruments of all kinds is ten cents for each folio (2 R. S. 39, § 30), and the taking any greater fee or reward for such service is a misdemeanor (*id.* 650, § 5, 7). It clearly appears that there was an overcharge in this particular, and the referee properly disallowed the same. Any agreement express or implied involving a violation of the statutes cited would be void. Nor can the statutes be evaded by means of an account stated, for that would be only evidence of an illegal agreement, which the court cannot sanction or tolerate. With respect to the fees for searches the law is not so clear. We agree with the referee that the fees for county clerks for searches, not required in foreclosure cases, are governed by the

revised statutes, and not by the Act of 1840, ch. 342, as was held by the late supreme court in *Trustees, &c., v. Van Horn*, 3 Den. 171. The title of a statute, though forming no part of it, may be resorted to for the purpose of limiting its application (*Bishop v. Barton*, 9 Sup. Ct. 486, and cases cited *Jones v. Sheldon*, 50 N. Y., 477). The title of the Act of 1840, shews that the intent of the legislature, in enacting the statute of 1840, was merely to accomplish a reduction of the expenses of foreclosing mortgages, and its operation should be restricted accordingly. The provision of the revised statutes on this subject, gives to a county clerk "for searching the records in his office, or the records of mortgages deposited in his office by loan-officers and commissioners of loans, or the dockets of judgments for each year five cents."

We are of opinion that the just interpretation of this language is that it entitles the clerk to charge for each year embraced in every record, which he is authorised to keep, and which he is required to search. It is his duty to provide different sets of books for the recording of deeds and mortgages, and other papers, documents, &c. (1 R. 756, § 2, 376, § 53). The right to receive a fee for performing any service carries, with it the corresponding duty of performing the service on payment of the fee, and this duty is enjoined upon the clerk by statute (*Laws 1847, ch. 470, § 40, 4 Edm. St. 588*). The duty is "to search the records when required to do so," and the fee is for "searching the records." In both statutes the term "records" is used distributively. For the act concerning the revised statutes, passed December 10, 1828, § 11, provided

"whenever in the revised statutes, or in any other statute, words importing the plural number are used, any single matter shall be deemed to be included, although distributive words may not be used (1 Edm. St. 71). A requisition to search a single record is within the duty enjoined, and the clerk may charge the prescribed fee therefor. For searching another record, if required, he is entitled to charge a similar fee, and so on. Statutes must have a reasonable construction in order to carry out the intention of the legislature. We are of opinion that the legislature intended to measure the compensation of the clerk, not by the period of time embraced in his search, but by the number of years, whether the same or different years embraced in the separate records searched. In other words that the term year was intended to embrace the space in the records searched, and not a period of time. Such an intention is more plainly expressed in the Act of April 11, 1853, relating to fees of the Clerk of the City and County of New York; but that fact does not shew that any other intention should be inferred from the statute under consideration, or that the latter statute is not plain enough. Besides, in the City of New York the records of deeds and mortgages are kept by the register and not by the clerk. The statute of April 11, 1853, does not apply to the former officer, or regulate his fees (*Kent's char. 126, 127, 1 R. St., 97 id., 112 § 4, 2 id., 286 § 61, 1 Edm. St. 117*).

It was suggested on the argument that the construction we have put upon the statute might lead to an abuse of it by the clerk multiplying the books in which the records are kept, as, for example, by keeping a record of warranty deeds, another of quit claim deeds and

so on; but such an apprehension is not well founded. There can only be one record of deeds, mortgages, and other homogeneous instruments, no matter in how many books they may be contained.

The judgment must be reversed and a new trial granted with costs to abide the event.

Opinion by *Gilbert J.*; *Mullin P. J.*, and *Smith J.* concurring.

COMMISSION TO EXAMINE WITNESSES.

N. Y. SUPREME COURT, GENERAL TERM
THIRD DEPARTMENT.

Beebe et al., v. *Winne*.

Decided May, 1876.

Irregularities in the return to a commission should be taken advantage of by a motion before trial.

Consent to the issue of a second commission is not a suppression of the first.

Both may be read in evidence, in the discretion of the court.

Motion for a new trial.

Two commissions were issued on the part of the defendant, to examine the same person. On the trial the defendant gave in evidence the second, and the plaintiff then, under objection, gave in evidence the evidence taken under the first.

Held, That the objection that there were irregularities, should have been taken advantage of by motion, before the trial. Consent to a second commission was not a suppression of the first. There was no order for suppression. The evidence under the first commission was direct evidence on the trial. It was as if the defendant had examined a witness, and the plaintiff had cross-examined him, and then the plaintiff had recalled the witness and examined

in chief. It is a matter of discretion at the trial.

Motion denied and judgment ordered on verdict, with costs.

Opinion by *Learned, P. J.*; *Bockes*, and *Boardman, J.J.*, concurring.

PRINCIPAL AND AGENT. CONTRACT BY SPECIALTY.

N. Y. COURT OF APPEALS.

Briggs, et al., *appls.*, v. *Partridge, et al.*, *respts.*

Decided March 21, 1876.

Only those persons can be sued on an indenture, who are named as parties thereto.

The doctrine applied to simple contracts, executed by an agent for an unknown principal, that the principal is liable thereon, cannot be extended to contracts under seal.

This action was brought to recover the purchase money agreed to be paid by and under a contract for the sale of land. The contract was written, and was signed, under seal, by one H., the purchaser. There was nothing upon the face of the agreement to show that defendant P. was in any way connected with or interested in the purchase. The covenants were between plaintiff and H., and the former, when he made and executed them did not know that H. was acting as the agent of defendant P. It appeared that H. was acting in the transaction under oral authority from P. to make the contract for him, and that P. furnished the money to make the payment made when the agreement was signed. The vendor remained in possession of the land, and no act of ratification of the contract on the part of P. was shown.

Edward D. McCarthy for *appls.*

Wm. F. Shepard for *respts.*

Held, That H. was bound to plaintiff as covenantor upon the covenants in the agreement, but that the covenant could not be treated as, or made the covenant of P. Only those persons can be sued on an indenture who are named as parties, and an action will not lie against one person on a covenant which purports to have been made by another. 10 Wend., 88; 4 Hill, 81.

Also held, that the contract could not be turned into and enforced as the simple contract of a defendant, in the absence of proof that he had received any benefit from the contract, or had in any way ratified it, (7 Cush., 374,) and therefore that the doctrine applied to simple contracts executed by an agent for an unnamed principal, could not be so extended as to apply to this case.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Andrews, J.*

FIRE INSURANCE. WAIVER.

N. Y. SUPREME COURT, GENERAL TERM,
THIRD DEPARTMENT.

Arkell, *respt.*, v. Commerce Insurance Company, *applt.*

Decided May, 1876.

A general agent may waive by parol a condition of a policy even where the policy provides that the waiver must be in writing.

A company held to be bound by acts of an agent after surrender of his agency, the insured being ignorant of such surrender.

Action on a policy of insurance. In the spring of 1873 plaintiff applied to the agents of defendant at Canajoharie for permission to make gas from gasoline which was granted, provided the tank was placed fifty feet from the building, that distance being deemed

by the agents not "contiguous" under a clause in the policy, which forbid such manufacture "within the building or contiguous thereto," and which also forbid its "use for lighting" "unless by special agreement endorsed on the policy." September 12, 1873, the agents surrendered their agency of which fact plaintiff was ignorant until after the loss occurred, and the agents continued to treat with plaintiff as such agents until after the tank was put in. In November plaintiff put in a tank and pipes and connected them with pipes in the building, the agents being present at the time.

Monell for the plaintiff.

Muller for the defendant.

Held, That a general agent may waive by parol a condition of the policy, even where the policy provides that the waiver must be in writing. Permission to generate gasoline must be taken to include "its use for lighting." The condition that may waiver must be endorsed on the policy, may be waived by a general agent. The plaintiff acted in good faith, the defendant's agents gave permission to generate gas, and were present when the apparatus was put in; it would be unjust that defendant's agents should lead plaintiff to an act under the assurance that it would not affect the policy, and that the defendant should be allowed to set up such act to defeat a recovery.

Judgment affirmed with costs.

Opinion by *Learned, P. J.*; *Bockes* and *Boardman, J. J.* concurring.

DEBTOR AND CREDITOR.

N. Y. SUPREME COURT. GEN'L TERM.
FIRST DEPARTMENT.

Levi Goldenburg *et al.*, *respts.*, v. Jacob Hoffman, *et al.*, *appls.*

Decided May 5, 1876.

Where a third person purchases from certain creditors of a failing debtor his debts at a stipulated per centum, and takes an assignment to himself, and such third person acts, not as agent for the debtor, but purely in his own behalf, the debts are not compromised in such manner that one creditor can enforce any balance of the indebtedness by proving simply that some other creditors received more than himself upon the sale of his claim.

Appeal from a judgment entered on the report of a referee in favor of plaintiff. This action was brought to recover of Jacob Hoffman and Julius Wineburg, two of the defendants composing the firm of Hoffman & Wineburg, and transacting business in Providence, Rhode Island, for goods sold and delivered by plaintiffs to them, and also to recover against the other defendants, Henry and William Wineburg, composing the firm of Wineburg Brothers, Worcester, Mass., on the ground that they had assumed and agreed to pay the debts of Hoffman & Wineburg. The answer set up a general denial. On the trial before the referee the following facts appeared:

That in the year 1873 Hoffman & Wineburg being in embarrassed circumstances made an arrangement with Wineburg & Brother, who undertook with them to purchase from their various creditors their respective claims against them, in consideration of the transfer to them by Hoffman & Wineburg of their stock of goods at Providence. Wineburg & Brother entered into an agreement with various creditors of Hoffman & Wineburg including the plaintiffs, which is set forth in the case in the following words:

"We, the undersigned creditors of

Hoffman & Wineburg, of Providence, R. I., for valuable consideration hereby agree with Messrs. Wineburg & Brother, of Worcester, Mass., and with each other to sell, assign, and transfer unto them all our claims against the said Hoffman & Wineburg on their paying to us twenty-five per cent. thereof in cash, and their notes for twenty-five per cent. endorsed by the said Hoffman & Wineburg at four and eight months in equal installments, bearing date the first of July, 1873, witness our hands and seals the 12th day of June, 1873."

This agreement was subscribed by a large number, but not by all the creditors. Wineburg & Brother paid the twenty-five per cent. in cash, and gave the notes for the remaining twenty-five per cent. in accordance with the agreement, endorsed by said Hoffman & Wineburg; and afterwards by an instrument set forth in the case Hoffman & Wineburg sold and transferred to Wineburg & Brothers all their stock of goods of every kind, nature and description in their store at Providence, Rhode Island, in consideration of their services in effecting a settlement of the co-partnership debts of Hoffman & Wineburg, and of obtaining the release from the creditors of said firm of their partnership debts.

The plaintiffs were paid by Wineburg & Brother the amount of the indebtedness of Hoffman & Wineburg, stipulated for in the agreement first mentioned. It was proved on the trial that some of the creditors of Hoffman & Wineburg, amongst whom two who had signed the agreement first above mentioned, were paid more than fifty per cent.; and the referee upon the proof has found that all the defendants

in this action were liable for the full amount of the indebtedness of Hoffman and Wineburg to the plaintiff.

Wm. Strauss, for the resp't.

C. A. Runkle, for the applt.

Held, The transaction is one where a third person steps in and purchases from the creditors of a failing debtor his debts at a stipulated per centum, and takes an assignment to himself. No fraud is shown on the part of Wineburg & Brothers, which would enable the plaintiffs to rescind the sale. If a third person is acting purely as the agent of the debtor, and takes the assignment for the benefit of the debtor, and that fact clearly appears, the assignment may doubtless be considered as in substance a compromise made by the debtor himself; but if he takes the title of the debt to himself for the valuable consideration paid by himself, so that he is at liberty to enforce it himself against the original debtor the transaction is one of purchase and sale wherein the liability of the debtor passes from the original creditor to the purchaser, and the debt is not compromised in such manner that the original creditor can enforce any balance of the indebtedness, by proving simply that some other creditors received more than himself upon the sale of his claim. The proofs do not show that the transactions between Wineburg & Brother and the creditors of Hoffman and Wineburg was in its legal effect a compromise for the benefit of the debtors.

We do not see any grounds upon which a recovery could be had in this action as against Henry and William Wineburg, but perhaps facts may be shown upon a new trial sufficient to uphold a recovery against the other defendants.

Judgment reversed, new trial ordered, costs to abide event.

Opinion by *Davis, P. J.*; *Brady and Daniels J. J.* concurring.

USURY. ASSIGNEE IN BANKRUPTCY. RIGHT OF TO RECOVER. EXCESS OF LAWFUL INTEREST.

N. Y. COURT OF APPEALS.

Wheelock, assignee, &c., resp't., v. Lee, applt.

Decided February 22, 1876.

An action to recover the excess of interest unlawfully exacted from the bankrupt, may be maintained by his assignee in bankruptcy, but he must pay or offer to pay the loan as a condition precedent; he is not a borrower within the meaning of our statute.

This action was brought by the plaintiff as assignee in bankruptcy of T. & Co. to recover excess of interest paid, within a year before the commencement of the action, by the bankrupts to defendant on usurious loans made by him to them, and also that certain notes of third persons, which had been turned out to defendant by T. & Co., as collateral security for certain usurious loans, be delivered up, and that a note for \$1,200, given for one of the loans by T. & Co., be declared void and cancelled. It appeared from the evidence that the money loaned T. & Co. by defendant exceeded the amount he had received including the excessive interest. No tender or offer to pay the balance was made by plaintiff. The court found the usury and granted the relief asked. Defendant's counsel requested the court to find that the loan was not fully paid. The request was refused.

B. E. Valentine, for the resp't.

George W. Van Slyck, for the applt.

Held, error, As this fact was material' and had been proved without conflict that plaintiff was bound to pay the sum loaned as a condition to granting equitable relief in respect to the securities held by defendant, that the right given by the statute to equitable relief without such payment is confined to the borrower and within the meaning of the statute, and that plaintiff was not a borrower (7 Hill 891; 1 N. Y., 274; 2 id. 131; 14 id. 94, 49 id. 373; 1 R. S. 772; 2 Seld. 113).

Also held, That an assignee in bankruptcy can bring an action to recover the excess of interest unlawfully exacted from the bankrupt; but that the right to recover the usurious excess does not accrue until after the loans with lawful interest has been repaid. (Dong. 697; 2 J. Ch. 187; id. 95; J. R. 292; 50 N. Y. 49; 14 U. S., stat. at large, 522.

Judgment of general term, affirming judgment for plaintiff at special term, reversed and new trial granted.

Opinion by *Andrews, J.*

ABUSE OF DISCRETION.

N. Y. SUPREME COURT, GENERAL TERM,
FOURTH DEPARTMENT.

Smith *et. al* v. Neals.

Decided January, 1876.

The rule that an abuse of discretion is ground for reversal applied to a peculiar case.

This action is brought to recover of the defendant, a married woman, the price of goods sold to her in 1873, to be put into a store in the city of Rochester, under the representation of plaintiff's claim that she was about commencing business of selling groceries, having a nephew as her clerk.

The defendant denied the representation, and alleges that she told plain-

tiffs that the goods were wanted for her nephew.

On the trial defendant was asked the question: "Did you communicate the fact to Mr. Perkins (one of the plaintiffs) that you had no control of the goods in that store, and, if so, what did you say on that subject?"

The question was objected to on the ground that it was re-opening the case, and the objection was sustained by the referee.

Evidence was given by plaintiffs that after the goods were sold defendant was in the store in which they were for sale, and from time to time sold portions of them.

There was judgment for plaintiffs.

Held, The rejection of the question by the referee was error. The evidence offered by defendant and rejected would have some tendency to support her view of the case and was competent, and should have been received, and to reject it on the ground of re-opening the case was an abuse of discretion.

Judgment reversed.

Opinion by *Mullin, P. J.*; *Smith and Gilbert J. J.* concurring.

RECEIVER. POWER TO BRING ACTION FOR PARTITION.

N. Y. SUPREME COURT. SPECIAL TERM.
SECOND DEPARTMENT.

A. V. N. Powelson, as receiver of the property and estate of Charles D. Reeve, v. Isaac Nelson Reeve, and others.

Decided May 20, 1876.

A receiver appointed under supplementary proceedings, may maintain an action for the partition of real estate in which the judgment debtor is interested as a tenant in common.

But the action being an equitable one, the court will order its discontinuance upon the payment of the judgment under which the receiver was appointed, together with his costs, fees and expenses as receiver.

In November, 1875, John Searles recovered judgment against Charles D. Reeve, for \$1,000, besides costs. Chas. D. Reeve, at this time, was the owner, as a tenant in common with others, of an interest in real estate, subject to the courtesy of his father. Execution having been duly issued and returned unsatisfied, proceedings supplementary to execution were instituted against Reeve, and terminated in the appointment of plaintiff as his receiver. Such appointment having been duly perfected, thereceiver obtained an order, *ex part.*, from the supreme court special term, granting him leave to commence an action against all proper parties for the partition of said real estate.

An action of partition was thereupon commenced by such receiver, against the other tenants in common, and all parties interested in the real estate.

The matter then came up at special term, on a motion made by defendant D., to set aside the order granting leave to bring this action on the ground that a receiver cannot maintain an action of partition, and that the court should interfere and protect the rights of the other parties interested in the property.

Charles G. Dill, for receiver.

Sharp & Nanny, for defts.

Held, 1. That a receiver of a tenant in common, appointed in proceedings supplementary to execution, may maintain an action for partition of the real estate.

2. That the action being in equity, the court in its exercise of equity, upon the receiver being paid his costs of suit,

his fees and expenses as receiver, and sufficient to pay off and discharge the Searles judgment, and enable him to fully complete and discharge the duties of his trust, could direct that the action could be discontinued, and if so paid in ten days, motion granted, if not, then motion denied, with costs, and the action to partition to proceed.

Opinion by *Barnard, P. J.*

LOCAL ASSESSMENTS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPARTMENT.

People, ex rel. Andrew J. Thompson, applt., v. Mayor and Common Council of the city of Syracuse, respt.

Decided January, 1876.

Where a single improvement was properly ordered by the city authorities, and was let under separate contracts, and distinct assessments made to meet the expense under each contract, which assessments were afterwards annulled, and a single assessment made to meet the expense of the whole improvement, the latter assessment is valid; that the improvement was done under separate contracts affects no substantial right.

This was a writ of certiorari to review an assessment, &c. The writ was granted, and this appeal is from such order.

The object of the certiorari is to invalidate an assessment for the expense of paving East Genesee street, from the west side of Grape street to the east side of Almond street, in the city of Syracuse.

The return made to the writ shows that on the 23d of May, 1870, a petition for this improvement, signed by a majority of the owners of the property upon the line thereof, was presented to the common council; that on the 10th

of September, 1870, notices of such proposed improvement were served upon the parties to be assessed, conformably to the requirement of section 1, title 7 of the charter; that thereafter the common council entered into a contract for the making of a portion of said improvement, namely: that between the west side of Grape street and the east side of Orange street; and that subsequently they entered into a like contract for the making of the residue of said improvement, and finally caused separate assessments to be made in the manner provided in the charter to defray the expenses of the respective parts of the work. The only irregularity complained of in the proceedings of the common council arose from their acts in dividing the improvement into two sections. But the separate assessments were subsequently cancelled, and the one under review was made, which embraces the expenses of the entire improvement from Grape to Almond street.

Burdick & Love, for relator.

Ruger, Wallace & Jenny, for resp't.

Held, The return is conclusive as to the facts stated in it, and must be taken as true. If it is false, the relators must seek their remedy by action. (*Haines v. Judges of Westchester*, 20 Wend., 625; *People v. Morgan*, 65 Barb., 473.) The return shows the requisite petition for, and notices of, the proposed improvement, that the work was done under contract, and has been completed. The fact that it was done under two contracts, instead of one, affects no substantial right. No legal error in the assessment has been pointed out, nor is it alleged that it was not prepared and authenticated conformably to the charter. The fact that it was preceded by assessments for the

expense of separate parts of the work, which were set aside and annulled, does not, in our opinion, affect its validity.

The objections of the relators seem to us to be unfounded in fact. The proceedings must, therefore, be affirmed with costs.

Opinion by *Gilbert, J.*; *Mullin, P. J.*, and *Smith, J.*, concurring.

MARRIED WOMAN. LEASE.

N. Y. SUPREME COURT. GEN. TERM.
FOURTH DEPARTMENT.

Eustapere, resp't., v. *Ketchum, et al. applts.*

Decided January, 1876.

A married woman who signs a lease not for the benefit of her separate estate or business, and not containing a clause expressly charging her separate estate, incurs no liability.

Her contracts not for the benefit of her separate estate are void.

This action was brought to recover rent for a dwelling house rented to defendants, husband and wife. The lease for the premises contained certain covenants, and was signed by both the husband and wife. The house was occupied by defendants and their family. Defendants answer separately, and Mrs. Ketchum sets up that she was, at the time the lease was executed, and still is, a married woman, and that the same was not for the benefit of her separate estate, &c., &c.

The judge, at the circuit, ordered a judgment for plaintiff.

J. M. Humphrey, for applt.

J. P. Parker, for resp't.

Held, That the common law disability of a married woman to make a personal contract remains, except as taken away by recent statutes.

That the disability to make contracts taken away by recent statutes only ap-

plies to two classes, viz: Those which relate to her separate estate or to her separate business, and except as to such contracts made for herself, or for her benefit, her naked personal contracts, made for herself, or for or with her husband, are absolutely void, unless she expressly charges her separate estate.

That the husband was bound to support his wife and family, and the covenants in the lease bound him only. The lease was not taken for Mrs. K., in her separate business, or in any way for the benefit of her separate estate. It was taken by her husband to provide a home for his family, and Mrs. K. not having in such lease, or in any way expressly charged her separate estate with the payment of the rent under said lease, she is not liable.

Judgment reversed.

Opinion by *Smith J.*; *Mullin P. J.* and *Gilbert J.*, concurring.

SETTING ASIDE DISCHARGE IN BANKRUPTCY—LIMITATION.

U. S. DISTRICT COURT WESTERN DISTRICT OF ARKANSAS.

Pickett v. McGarick.

Decided April, 1876.

Although under the ordinary statutes of limitations, the rule is that where the cause of action is based upon fraud, the statute does not commence to run until it has become known to the party injured by the fraud, still, as by section 34, of the bankrupt act, it is positively provided that the discharge may be contested within two years after the date thereof, this must be taken as the limit, and the plea of the statute of limitation is a good plea, in an action to set aside a discharge as fraudulently obtained.

This was a suit brought by the plaintiff as assignee in bankruptcy of the defendant, against the defen-

dendant, to recover from him a large amount of diamonds, alleged by the plaintiff to be of the value of \$5,000

Plaintiff alleges, that on the 19th day of December, 1868, defendant filed his petition in the bankrupt court of the Eastern District of Arkansas, sitting at Little Rock, that he was duly declared a bankrupt, and on the 14th day of June, 1871, received his discharge as such bankrupt. That the plaintiff was appointed assignee of said bankrupt. That at the time the defendant filed his schedule of assets, he omitted from said schedule the following property, to-wit: 3 solitaire diamond studs, 1 cluster diamond ring and 1 pair of diamond cuff-buttons, all set in gold, valued at \$5,000, That the defendant fraudently withheld these from the assignee. This suit in equity is to set aside the discharge and recover the diamonds, or their value, for the benefit of creditors of this bankrupt. Suit was brought the 10th of June, 1874.

Plaintiff alleges that he did not discover the fraud until July, 1872.

The plaintiff, among other things, prays that the discharge of the defendant as a bankrupt be held void, and that the defendant be still responsible for his debts. To this bill in equity defendant sets up the plea of the statute of limitations, alleging in said plea, that said supposed cause of action in said complaint mentioned did not accrue any time within two years next before the exhibiting of the bill of said plaintiff against the said defendant in this behalf.

Held, Section 34 of the bankrupt act provides, that any creditor of the bankrupt may at any time, within two years after the date of the discharge, apply to the court to set aside and

amend the same, on the ground, that it was fraudently obtained. When did this cause of action first accrue in a case under this section; from the date of this discharge or the discovery of the fraud?

Under the ordinary statutes of limitations, which provide that suits shall be brought at a specified time after the cause of action accrues, it has become a fixed rule, that where an action is based upon a fraud, the statute does not commence to run until it has become known to the party injured by the fraud. Because it can well be said that the cause of action did not accrue until the party could avail himself of a remedy to enforce that cause of action and he could not do so until the cause of action was discovered. But this section is different from the ordinary statutes of limitations. It positively provides that the discharge may be contested at any time within two years after the date thereof.

That time must then be taken as the time when the cause of action accrues. From the language of the 34th section, and the general policy of the law, I am inclined to the opinion that Congress intended to limit the creditors in any case representing them to two years from the date of the discharge, in which they may seek to set it aside. This is the interpretation placed upon that section by all authorities.

I am aware that a different construction was placed upon this section by Judge Taft, judge of the Superior Court of Cincinnati, in *Perkins v. Gray*, 3 N. B. R. 772, when he held that the discharge could be attacked at any time, and in any court for fraudulent concealment.

But with all due respect to the learned judge, I think this is not good law.

That such a construction is not deducible from the language of the law upon, or from its intent or spirit.

With my view of the law, the plea of the statute of limitations will be held good. Judgment for defendant.

Opinion by *Parker, District Judge.*

RAISED CHECK. LIABILITY OF PURCHASER AND DRAWEE.

SUPREME COURT OF TEXAS.

City Bank of Houston v. First National Bank.

Decided January Term, 1876.

A check for twenty dollars, drawn on the First National Bank of Houston, was fraudulently altered and raised by the payee to two thousand dollars. It was purchased of him by J. & Co., who endorsed it to their agents, the City Bank of Houston, who presented it to the First National Bank, and it was by said bank pronounced good. In the usual course of business it was taken up by the First National Bank in the exchange of checks after bank hours. The City Bank thereupon gave J. & Co. credit for the amount. The forgery was not discovered until the next month, on the balancing of the accounts between the two banks.

Held, That the National Bank was entitled to recover the amount from the City Bank as money paid under a mistake of fact.

This suit was brought by the First National Bank of Houston, to recover of the City Bank of Houston the sum of \$1,980.00 alleged to have been paid by mistake. A brief history of the transaction will be necessary. On February 19, 1872, the Texas Banking and Insurance Company of Galveston issued to a stranger, claiming the name of D. J. Wallace, the following check; \$20.

THE TEXAS BANKING AND INS. CO.

GALVESTON, February 19, 1872.

Pay to the order of D. J. Wallace,

in current funds, twenty dollars. No. 364.

ALPHONSE LAUVE, Cashier.
To First National Bank, Houston.

After its issuance this check was fraudulently altered, so as to read as follows:

\$2000.

THE TEXAS BANKING AND INS. CO.

GALVESTON, February 17, 1872.

Pay to the order of D. J. Wallace,
in current funds, two thousand dollars.
No. 364.

ALPHONSE LAUVE, Cashier.

To First National Bank, Houston.

In this altered condition the check was, on February the 25th or 26th presented to plaintiff, but the party presenting failed to identify himself satisfactorily as the payee Wallace, and payment was refused. At the time, Wallace was accompanied by Mr. Gray, assistant teller of the City Bank, who said: "This is Mr. Wallace, or a man of that name, who keeps an account with us that is under that name." This was deemed insufficient, and Gray refusing to endorse for him, payment was refused.

On or about March 4th, the altered check was purchased by C. R. Johns & Co., a banking firm at Austin, Texas, of a party who was introduced to them by a person known to them, as D. J. Wallace, and who in that name endorsed to them the check. They endorsed it to their correspondent and agent, the City Bank of Houston, for the purpose of collection. On the morning of March 6th, the check thus endorsed was presented by the City Bank to the National Bank, and was by the latter pronounced good, and on the evening of that day, in accordance with the custom of these banks, the City Bank endorsed the check and received credit for the amount as so

much cash. When the check was pronounced good, the City Bank gave Johns & Co. credit for the amount and notified them of the fact.

It was the custom of the Texas Banking and Insurance Company, and the First National Bank of Houston to transmit to each other, between the 1st and 3d of each month, an account current, showing the transactions between them for the preceding month. This account for February had been transmitted and received by the First National Bank, and entered up by its book-keeper, before the presentation of the check on March 6th, and showed check No. 364 to be for \$20, and of date February 19th, and of course did not show any check corresponding to the one paid. On the 3d day of April, on the interchange of accounts for the month of March, the alteration of the check was discovered, or at least suspected, and after enquiry of, and hearing from the drawer, was made known at once to the defendant, and the check was examined at this time by the officials of both banks, who detected no evidence of its having been altered.

The facts seem only to have been fully ascertained some days afterward, after a trip by the president of the National Bank to Galveston, made for the purpose, and personal demand for the return of the money was not made until April 9th. The defences set up were, that the plaintiff had notice that no such check had been drawn on them at the time of the payment; that the check, prior to any endorsement by defendant, had been submitted to the plaintiff and pronounced by it to be good, thereby virtually accepting the same, and that upon the faith of that acceptance, defendant endorsed said check, and credited their correspon-

dents with the amount thereof; that by the negligence of the plaintiff, in failing to inform defendant that the check was raised, all remedy against Wallace had been lost, and that by this negligence, and by its acceptance, plaintiff was estopped. It was also alleged that the drawer of the check had been guilty of a negligence in failing to use a perforating instrument, then used by bankers.

There was no evidence that the interchange of monthly accounts was adopted for the purpose of detecting forgeries or alterations, or that there was any custom of bankers to refer to such accounts before paying the checks of their correspondents, though one witness said as a matter of prudence he would do so.

Everett, a member of the firm of C. R. Johns & Co., testified that they were first advised of the check being raised by letter from the cashier of the City Bank on April 11; that he at once commenced search for Wallace, but did not find him. Had he been promptly advised of the forgery, thinks he could have overtaken or found Wallace. If he had been telegraphed ahead twenty-four hours, don't think Wallace could have got out of the State without his catching him; considers his recovery from Wallace entirely lost.

There is no other evidence whatever, as to damage resulting from the delay to discover and give notice of the forgery, unless it be the statement of the cashier of Johns & Co., that he paid Wallace \$2,000 for the check; that Wallace was introduced by a person whom he believed responsible; thought they would have recourse on him; but did not know that the money could be made out of him. It does not appear

to be seriously contended that the Texas Banking and Insurance Company was guilty of any negligence in the manner of drawing the genuine check No. 364, though there is some evidence in regard to the utility of a perforating instrument in preventing the successful alteration of checks.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

Held, The general rule is that money paid under a mistake of fact may be recovered back, and that, too, although the party may have had the means of knowledge.

On general principles mere negligence in making the mistake is not sufficient to preclude the party making it from demanding its correction. Such negligence does not give to the party receiving the payment the right to retain what was not his due, unless he has been misled or prejudiced by the mistake. If the loss had been incurred and become complete before the payment, he should not in justice be permitted to avail himself of the mistake of the other party to shift the loss upon the latter.

In this case it is evident that the loss had been incurred by Johns & Co. when they purchased the raised check from an irresponsible party. The subsequent mistake of the plaintiff, in paying this altered check to the defendant, the agent of Johns & Co., should not serve to shift the loss, unless the defendant or Johns & Co. had been damaged in some way by the laches of plaintiff, or unless there is some rule of law prohibiting the latter from setting up the mistake.

If the forgery had been in the signature of its correspondent, it is well settled that there is a rule of law for-

bidding the bank from setting up such a mistake. In such a case the mistake is covered by a failure on the part of the bank to fulfil its acknowledged duty—that is, to know the signature of its correspondent or customer.

But it is now also settled that this rule does not apply to altered or raised checks; as to which the acceptor or drawer is not presumed to be better able than the endorser to detect the alteration.

If the plaintiff is estopped in this case, it is not because of any rule peculiar to the mercantile law, but because the facts bring the case within the general principles of estoppel. It is true there are early authorities which hold a party paying a forged draft to great diligence in giving notice. The modern doctrine is believed to be, that as against one who passes a forged bill or check, and especially in favor of a drawee who pays to such party on the faith of his endorsement, and in so doing violates no obligation or duty, reasonable diligence is all that can be required, and when that is exercised and no damage has resulted from the delay, the right to recover is not lost.

Judgment affirmed.

Opinion by Gould J.

WILLS. ATTESTATION OF.

N. Y. SUPREME COURT, GENERAL TERM
FIRST DEPARTMENT.

The Sisters of Charity of St. Vincent de Paul, *appls.*, v. Mary Kelly, Ann Malony, and Margaret Doolan, *respts.*

Decided May 5th, 1876.

The attestation clauses to a will in the precise form provided by statute, are not essential prerequisites to its validity, nor is the clause declaring the selection of the executor.

Where the signature of the testator occurs after the disposing clause in

the will, and before the attestation clauses, in a blank in the last clause of the will appointing the executor, the signature will be regarded as a signing at the end of the will, according to the provisions of the statute.

Appeal from a decree of the surrogate of New York county, refusing to admit to probate a paper alleged to be the last will and testament of John Kelly. The alleged will presented for probate was partly written and partly printed. The last sentence, or clause of the will, before the attestation clause, read as follows: "Likewise I make, constitute, and appoint Edward McCarthy to be executor. J. Kelly, of this my last will and testament, hereby revoking all former wills by me made." The will had no other subscription by alleged testator, John Kelly, except in a blank in the printed clause, after the attestation clause, which clause made a declaration of facts, intended to show the proper execution of the will, and began as follows: "Subscribed by John Kelly, the testator named in the foregoing will, &c."

From the evidence taken before the surrogate, it appeared that the testator said to the witnesses, taking a paper from his pocket, I have drawn a will, or, I have made my will, and I want you to witness it. The second signature of the testator, John Kelly, in the blank between the words "subscribed" by and "the testator" was made after the attesting witnesses had signed their names to the will, and was thus made after, and not before, he had pronounced the will to be his, and after he had requested the persons present to witness it. The first signature, J. Kelly, was on the will when the witnesses were requested to sign the paper. The question presented on the appeal was,

whether the will was signed at the end within the meaning of the statute regulating the execution and attestation of wills. (2 R. S., 63, Part 2, chap. vi., art. 3, § 40.)

James A. Deering, for applt.

Otto Horwitz, for respt.

Held, That if the name of J. Kelly can be regarded as at the end, then the requisition of the statute is complied with. The object to be accomplished by the statute was to prevent any interpolation, or change, or addition, to the testamentary part of it. Such a formality was not required at common law. *Tonnella v. Hall*, 4 Coms., 145, per Jewett; 1 Jannan on Wills, Perkins' ed., 114, and notes.)

The attestation clauses in the precise form provided by statute are not essential pre-requisites (*Conboy v. Jennings*, 1 Sup: Ct. Repts., 622; nor is the clause declaring the selection of the executor.

The law supplies the omission of the testator to name his executor by appointing one with the will annexed.

The signature J. Kelly was intended to be that of the testator to his will, and his intention should not be frustrated by the accidental selection of a locality to sign it, which, though within the spirit is not expressly within the letter of the statute. (In the goods of *Woodby*, 3 Law. Tr., 429.)

The disposing clauses of the will all occurred before the signature J. Kelly, and what occurs after might be rejected as surplussage. The decree of the surrogate should therefore be reversed, the will admitted to probate, and letters testamentary issued to the executor named.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

LIFE INSURANCE. AGENCY. REPUDIATION.

N. Y. SUPREME COURT. GEN'L TERM,
THIRD DEPARTMENT.

Howell, respt., v. *Charter Oak Life Ins. Co., applt.*

Decided May, 1876.

Authority to an agent to solicit applications for life insurance does not give him authority to collect premiums.

The principal has a reasonable time to repudiate the acts of an unauthorized agent, even if the death of the insured intervenes; and he need not tender back the premium received by such an agent. If he notify the agent of his dissent to his acts he need not notify the insured.

The policy was issued by the general agent of defendants, one Stocker, and delivered to the deceased, who resided at Watkins, in February, and remained in his possession until his death, April 27, following. It was delivered to him to examine, to determine whether he would take it. No premium was paid then. One Stone, an agent of defendant, gave to C., in April, verbal, and afterwards, and after April 18, written authority to solicit applications in certain towns other than Watkins. C., knowing the insured to be dangerously sick, requested H. to get the premium of the insured. H. did so, and gave it to C., April 17. C. wrote to Stocker, who refused to receive the premium, and the defendant, on being notified, also refused. The premium was returned to the plaintiff in this action, for whose benefit the policy was issued. May 6, C. testified on the trial that he was not agent for the defendant for Watkins, nor was he such in suggesting to H. that the premium be paid.

McGuire, for plttf.

Hill, for deft.

Held, That authority to an agent to

solicit applications for an insurance did not give him authority to collect premiums; at any rate not on policies not issued through him. He was a mere volunteer, and C. being unauthorized to receive the premium, the defendant was entitled to a reasonable time to repudiate his acts, even though the death of the insured intervened. Where a payment depends for its validity on subsequent acts ratifying it, it is for the plaintiff to show such ratification. The principal should notify the unauthorized agent of his dissent, but need not notify the third party. Even if he ought to notify the third party, the insured, he ought to have a reasonable time to do so. If the agent was unauthorized, the principal need not tender back the money.

New trial ordered, costs to abide the event.

Opinion by *Learned, P. J.*; *Bockes* and *Boardman, J.J.*, concurring.

PARTY IN INTEREST.

N. Y. SUPREME COURT. GENERAL TERM
FIRST DEPARTMENT.

Horatio N. Devol, *plaintiff*, v. David Barnes, *deft.*

Decided May 5, 1876.

A plaintiff has a sufficient interest to sustain an action upon several promissory notes endorsed to him for the purpose of collection, such endorsements being made upon the understanding that plaintiff would collect the notes if possible, and then account to the respective endorser for the proceeds of the notes over and above their respective shares of plaintiff's expenses, and the expenses of collection.

Appeal from judgment entered on verdict for plaintiff.

This action was brought upon a draft and several notes. In respect to the draft, no defence was made at the trial. The several notes were originally made

to other parties, and endorsed by them to the plaintiff before suit. They were endorsed and delivered to the plaintiff under an arrangement, in substance, that he should go from New Albany, Indiana, to the city of New York and collect the notes if possible, and then account to the respective endorsers for the proceeds of the notes, over and above their respective shares of plaintiff's expenses and the expenses of collection.

The obvious intention of the owners of the notes was to put them into the hands of the plaintiff, so that he could bring a single action in his own name upon them all, and after collection deduct a pro rata share of his expenses in coming to New York and of the expenses attending the collection from the proceeds of each note, and pay over the residue to the endorsers.

The only question in the case was whether this made plaintiff a party interested, so that he could maintain an action on the notes in his own name.

Wm. Man, for resp't.

George H. Foster for apl't.

Held, The legal title of the claim sued upon is very clearly vested in the plaintiff. He could receive payments, give receipts, discharge the indebtedness, and in the proceeds he would have a personal interest, as he was only bound to account for an uncertain balance after deducting his expenses and the costs of proceedings for the collection. We think plaintiff had sufficient interest to maintain this action, and that this case comes within the principle of *Allen v. Brown*, 44 N. Y., 228; *Eaton v. Alger*, 47 N. Y., 345.

Judgment should be affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J.J.* concurring.

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PRINCIPAL AND SURETY. RELEASE OF SURETY BY SURRENDERING COLLATERALS.

ENGLISH HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION.

Polak v. Everett.

Decided February 10, 1876.

The fact that a surety stands by and sees the holder of his obligation do something, which will discharge him from his contract, without declaring that he shall consider himself discharged if the act is done, does not estop him from setting up and relying upon such act as a discharge. He is not bound to warn the parties of the consequences of the alteration of the contract.

Any intentional act which materially changes the contract without the surety's consent will discharge him, whether it was for his benefit or not, and even though he might have sustained only nominal damages.

A surety is discharged by the creditor releasing a security in his hands for the principal debt, though it does not go to cover the whole of that debt, and the creditor allows the surety the whole value of the security.

This was an action on a guarantee entered into under the following circumstances:

The plaintiffs are wine merchants carrying on business in the city of London, and the defendant is a discount broker in business in the same city.

In 1873, one Etienne Nazarkiewich had arranged to dispose of his business as a wine merchant to a limited liability company, to be called E. Nazarkiewich & Co. (Limited.)

At that time he was indebted to the plaintiffs in the sum of £8,400; and on the 20th of December, 1873, it was

agreed between them that that amount should be liquidated in the following manner: £2,400 was to be paid by Nazarkiewich to the plaintiffs on or before the 15th of February, 1874; and £6,000 was to be paid in fully paid up shares, or share-warrants in "E. Nazarkiewich & Co." within three days after the first allotment of shares in that company, which Nazarkiewich was to redeem within twelve calendar months from the first of January, 1874; and the redemption was to be guaranteed by the defendant.

It was also agreed that the book debts of Nazarkiewich should be collected by one Vispe, on behalf of Messrs. Tampier, of Bordeaux, and the plaintiffs, to be divided equally between them as collected; the amount paid to the plaintiffs being applied towards redemption of the £6,000 of shares.

On the same day the defendant signed a written guarantee to the plaintiffs for the fulfillment by Nazarkiewich of the above agreement "so far only as concerns the full redemption of the shares and share-warrants therein mentioned of the value of £6,000 on or before the 1st day of January, 1875."

The first allotment of shares in E. Nazarkiewich & Co. took place on the 18th of February, 1874, but the £6,000 worth of shares was not transferred by Nazarkiewich to the plaintiffs within three days after that event.

In May and June, 1874, negotiations were carried on between the plaintiffs, Nazarkiewich, and a Mr. Asser, one of the directors of E. Nazarkiewich & Co., for the repurchase by Nazarkiewich of the plaintiff's share of his book debts, and the transfer of them by him over to the company, and on the 1st of July, 1874, the plaintiffs gave a receipt to

Nazarkiewich for fifteen fully paid-up shares in the company, of £250 each, four acceptances for £250 each of the company, dated the 26th of June, 1874, at thirty days, four months, six months, and nine months, respectively, and £190 in cash, "in part discharge of our claim of £6,000, and provided the above bills are paid at maturity, we agree to release our charge or interest in the book debts of Mr. Nazarkiewich."

The defendant was chairman of the company, but he did not agree to the repurchase and transfer to the company of Nazarkiewich's book debts.

The declaration in the first count set out the agreement of the 20th of December, 1873, between the plaintiffs and Nazarkiewich, and the guarantee of the defendant to the plaintiffs of the same date, and averred that Nazarkiewich had caused shares in the company to the nominal value of £3,750 to be issued to the plaintiffs, and that they had not been redeemed.

The second count contained an additional averment that the plaintiffs, by the authority of the defendant, assigned their interest in the book debts to the company.

The defendant in his pleas traversed various allegations in the declaration, but the only pleas material to this report were the seventh, upon equitable grounds—that the defendant was discharged by the agreement between the plaintiffs and Nazarkiewich for the transfer by the plaintiffs of their interest in Nazarkiewich's book debts to the company—and the eighth, upon equitable grounds—that the defendant was discharged by the material variation without his knowledge of the terms of the agreement set out in the declaration.

Issue, and demurrer and joinder to the 7th and 8th pleas.

At the trial before Denman, J., at the last Michaelmas Sittings in Middlesex, the facts above set out were proved, and a verdict for the plaintiffs was taken by consent for the damages in the declaration, with leave to the defendant to move to enter it for him, or to reduce the damages to such sum as the court might direct; the court to draw all necessary inferences of fact.

The demurrer was dropped, all the points being considered upon the argument of the motion.

Held, We think the defendant is entitled to judgment. It was argued that he was discharged as surety, and that was made out by the facts.

To say that a person becoming aware that another person is going to do something, which, if done, will discharge him from his contract, is therefore bound to warn him of the consequences of his doing it, is not a tenable proposition. That brings it round to the question whether, on the facts, what has taken place has had the effect of discharging the surety. Upon that it has been established for a very long time, beginning with *Reese v. Berrington*, 2 Wh. & Tud. 4th ed. p. 974, and downwards, that a surety is discharged by giving time, upon the principle that a creditor, who, without his consent, gives time to the debtor, deprives the surety of his remedy, viz, to use the name of the principal creditor to sue the debtor. If that is suspended for a day, or even an hour, although the surety is not injured, and possibly may even have been benefitted, nevertheless it is established that that discharges the surety. Whether that is a just principle is a matter it is far too late now to

think about; but from the time of *Rees v. Berrington* it has been unquestioned, and has been said so many times that nothing but the legislature can make any alteration. Now in the present case it is not by giving time, but there has been an equal interference with the rights of the surety. He had the right to have the book debts to look to as his security; that right he has been deprived of by releasing the book debts by the wilful act of the plaintiffs. Taking it as it stands here, it seems to me the defence is made out, and the defendant is entitled to judgment.

Opinion by *Blackburn, J.; Mellon* and *Quain, J.J.*, concurring.

NEGOTIABLE PAPER. FORGERY. LIABILITY OF DRAWEE AND ACCEPTOR.

N. Y. COURT OF APPEALS.

White et al, applts., v. The Continental National Bank, respt.

Decided March 21, 1876.

The drawees of a bill of exchange are only held to a knowledge of the signature of the drawer; and in accepting and paying a bill which has been fraudulently raised after delivery to the payee, they merely vouch for the genuineness of the signature of the drawer, and may recover back from the holder whatever they may have paid over the amount of the bill as originally drawn.

The holder of such a raised bill is held to a knowledge of his own title, and of the endorsements of the bill prior to his.

This action was brought to recover \$2,750, and interest thereon, from Aug. 18, 1869, received by defendant upon a sight-draft, dated Aug. 9, 1869, drawn by one W., at Buffalo, on the plaintiff's banking firm, in New York city, pay-

able to the order of one C. The draft was drawn for \$27, and after its delivery to the payee it was fraudulently altered to \$2,750, and was afterwards presented to and accepted by the plaintiff. The forged draft was sent by one H., of Baltimore, to A. B. & Co., of New York city, in a letter received by them, Aug. 16, 1869, asking for a sterling bill of exchange, at sixty days, on London, for the amount of \$2,750. A. B. & Co. deposited the draft on the day it was received, in defendant's bank, with other checks and drafts, and were credited with the amount of it. The draft was presented to plaintiffs, who accepted it, payable at the Leather Manufacturer's Bank. It was presented there and certified, and was paid by said bank, through the clearing house, in regular course of business. A. B. & Co., on Aug. 16th, sent a bill of exchange on London, for the full value of the draft, to H., by mail. Plaintiffs were not advised of drafts drawn upon them by W., except by the presentation thereof for payment, and they were not notified of the alteration in the draft until October 6th, when they gave notice to defendant. The court, at the trial, left it to the jury to say whether defendant could have saved itself from loss if it had known of the forgery on the 17th of August, and charged that if, by relying on the acceptance and payment of the draft by plaintiffs, the defendant has lost an opportunity of protecting itself, it was entitled to a verdict. The jury rendered a verdict for the defendant.

Hamilton Odell, for applt.

Wm. Allen Butler, for respt.

Held, error; That defendant acted upon other evidence of its right to the money than the statement or actions of

plaintiffs; in dealing with the bill and its avails it acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom they received it; plaintiffs therefore owed no duty to defendant in respect to the former; and that plaintiffs owing no duty, and making no misrepresentations could not be chargeable with negligence which could defeat their right to reclaim the money paid, and there was no estoppel to bar this action. (3 Comst., 230; 40 N. Y., 391; Continental Nat., Bk. v. Nat Bk. of Comm., 50 N. Y., 575, distinguished.)

Plaintiffs, as drawers of the bill, were only held to a knowledge of the signature of their correspondents, the drawers; that by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of a want of genuineness of any other part of the instrument, or of any other names appearing thereon; or of the title of the holder. (9. M. & W., 54; 46 N. Y., 77; 10 Wall., 604; 18 id., 604; 4 Comst., 147.) That defendant is held to a knowledge of its own title, and the genuineness of the indorsements, and of every other part of the bill other than the signature of the drawers within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument. (15 N. Y., 575; 40 Id., 456; Story on Notes, §§ 135, 379-381.) The presentation of the bill, and the demand and receipt of the money thereon were equivalent to an indorsement. The drawees had a right to act upon the presumptive ownership of the defendant as the apparent holder.

Judgment of general term, affirming judgment on verdict for defendant reversed, and new trial granted.

Opinion by *Allen, J.*

ACCOUNT STATED.

N. Y. SUPREME COURT. GEN'L TERM.

FIRST DEPARTMENT

William Barker, admr., *applt.* v. Newton W. Hoff, trustee, &c., *respt.*

Decided May 5, 1876.

Where an account stated is plead in defence to an action, and plaintiff avers that it was made at defendant's request to influence the action of another, but without effect, and that the accounts were in fact still open, it should go to the jury as to whether the account was in fact still open.

Appeal from judgment dismissing the complaint at special term.

Plaintiff's intestate, Smith Barker, had for some years been executor and trustee of one John Peutz. In June, 1872, said Smith Barker died, leaving the estate of Peutz largely indebted to him for moneys expended in its behalf, commissions, &c. Subsequently defendant was appointed trustee of said estate.

This action is brought to recover said indebtedness. The answer, by way of defence sets up an account stated, signed by plaintiff, as administrator, &c., of the Peutz estate. Plaintiff replies that after the death of the intestate, and before the appointment of another trustee, the account was prepared at the request and with the assistance of defendant, who dictated the same. That defendant prepared it for the purpose of inducing one Townsend to qualify as trustee of Peutz's estate, as Townsend had refused to qualify until he knew how the accounts between the two estates stood. That as an inducement for

his signing it, the defendant had promised that there should be a full accounting, so soon as a trustee should be appointed. Townsend eventually refused to qualify, and defendant was appointed trustee instead.

At the trial the complaint was dismissed, and judgment rendered for the defendant on the pleadings.

Rowan & Hehn, for applt.

George Hill, for resp't.

On appeal

Held, That the account appears to have been made in accordance with defendant's wish, in order to induce Mr. Townsend to qualify. This object being known, it was wrong in plaintiff to have assented, but yet, in fact, it did no wrong to Mr. Townsend, because he did not qualify.

Plaintiff does not seek any benefit from the arrangement, made in reference to Mr. Townsend, or to urge any claim or demand which was not reserved between him and defendant when that arrangement was made. His claim, if it really exists, is in nowise connected with, nor does it grow out of this arrangement, and therefore the maxim, "That where one of two wrongdoers seeks an advantage from the unlawful combination, the defendant is in the better position," does not apply.

The issue presented, as to whether in fact, the accounts are still open, should have been tried. Defendant was not entitled to judgment on the pleadings. Judgment reversed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniel, J.*, concurring.

USURY. DISCOUNT.

SUPREME COURT, DISTRICT OF COLUMBIA.
GENERAL TERM.

The Second National Bank of Leavenworth v. Samuel Smoot and others.

Decided January, 1876.

A promissory note, actually made and signed in the city of Washington, but dated at Leavenworth, in the State of Kansas, and sent to the Second National Bank of Leavenworth, and by it discounted, is to be governed as respects a question of usury by the laws of Kansas.

To take out interest in advance on discounting a note by a bank is not usurious.

A contract for a loan of money at a rate of interest which is legal in the place where the contract is made, though the money is to be repaid in a State where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the State where the money is to be repaid.

The action in this case was brought by plaintiff as holder of a promissory note made by the defendants, Smoot and Pomeroy, bearing date on the 27th of November, 1873, for \$7,000, which note was made payable to the order of the defendant, Darling, at the Second National Bank, Leavenworth, Kansas, with 12 per cent. interest until paid. This note thus made and endorsed was transferred by indorsement to the plaintiff.

The cause was tried at the circuit court, and resulted in a verdict for the plaintiff.

Sometime before 1873, Smoot, one of the defendants, obtained a loan from the plaintiff. (Second National Bank, Leavenworth, Kansas,) of \$20,000.

This loan of \$20,000 from the bank was secured by the promissory notes of Smoot and Pomeroy,

These notes were given, one for \$8,000, one for \$7,000 and one for \$5,000, were made payable on time, executed and sent from Washington, D. C., to the bank in Kansas; and the bank paid to the defendant, Smoot, the proceeds

of these notes, less the discount for the time they had to run, at the rate of 12 per cent. per annum; the rate of interest agreed upon in the notes was 12 per cent. per annum after the maturity of the notes until paid. Twelve per cent. per annum being the highest rate of interest allowed by law to be taken for the loan of money in the State of Kansas. These notes not being paid at maturity, some or all of them, new notes were given in renewal, and the new notes secured the payment of the amount due, including principal and interest, at the rate above mentioned.

Thus went on the dealings between Smoot and the bank until all of the loan of \$20,000, and interest thereon was paid, except a note for \$7,000, dated the 27th of November, 1873, payable 90 days after date at the bank in Kansas, made by Smoot and Pomeroy and indorsed by the other defendant, Darling, upon which note this suit is brought.

The plea interposed was the general issue. Under that issue was attempted to be tried whether, if the loan was not usurious in its inception, it did not become so by the arrangements that were made on the renewal of the various notes that were given.

The defense relied mainly on three propositions:

1. That the notes given to secure the original loan of \$20,000, being actually made and signed in this city and sent to Bank of Leavenworth, and by it discounted, it was a contract made in Washington, and not in Kansas, and that the law upon the subject of usury in this District must govern this contract of loan, instead of the usury laws of Kansas, the rate of interest authorized to be contracted to be paid being

much less per annum than the rate allowed by the law of Kansas.

2. That by the arrangement entered into by which the discount was taken out of the proceeds of these notes, whether of original or renewals, the contract was usurious.

3. That some one or more of the renewal notes were made payable in the city of New York, in which State the law allowed, upon contracts made by its citizens to be performed within the State, a rate of interest not to exceed 7 per cent. per annum.

Held, No valid contract was made for this loan of \$20,000, until the notes offered as a security for its payment were accepted by the plaintiff, and the money advanced upon them.

To take out interest in advance, is discounting a note without regard to the rules of rebate or discount, and there is no distinction between bankers and others.

That a contract for a loan of money at a rate or interest which is legal in a State where the contract is made and where the loan is to be advanced, though the money is to be repaid in a State where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the State where the money is to be repaid.

The judgment of the court below must be affirmed with costs.

Opinion by *Olen, J.*

SALE.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPT.

Alexander et al., *appls.* v. Fowler,
respt.

Decided May 5, 1876.

An exact meeting of the minds of the parties with reference to all its terms and incidents is necessary to constitute a contract of sale.

Appeal from an order on the trial of the cause dismissing the complaint and directing that the exceptions be heard at first instance at general term.

Action to recover damages for the breach of an alleged contract for the purchase of 700 tierces of lard by the defendant's failing to accept and pay for the same.

The complaint was dismissed at the close of plaintiff's evidence on the following grounds.

That upon the proof there was no evidence of any contract such as alleged in the complaint for the purchase of the lard, or of any contract that was valid under the statute of frauds.

The following facts appeared on the trial:

The defendants, Fowler Bros., applied to one M., a broker, in New York city to purchase lard for them. Almost immediately thereafter defendants received the following instrument from him:

"Bought for account of Fowler Bros., in St. Louis, (through M. P. Drysell,) (700) seven hundred tierces prime steam lard, brand Ruddick Kizer & Co., 9 cents per pound.

"Deliverable buyers option.

"March 31st, 1872.

"Buyers in St. Louis.

"G. M. M.,
"Broker."

About the same time M., the broker, in New York, telegraphed to D. in St. Louis, who was connected with him in business.

When the broker in St. Louis received notice by telegraph of the transaction of M. and the defendants with

respect to the lard, he delivered the following instrument to the plaintiff.

"St. Louis, Mo., February 17, 1872.

"I have this day bought of Messrs. A. & C. for account of Messrs. Fowler Bros. of New York, 700 tierces of Kizer & Smith prime steam lard, delivered on cars at Keokuk, Iowa, at the option of the buyers during all of March, 1872.

"Quality to be standard as per rules of the St. Louis Union Merchant's Exchange, and in good new wooden bound tierces. Tares actual.

"Terms cash on delivery. At the rate of 9 cents per pound.

"Brokerage 1 % payable by the buyers.

"M. C. D.
"Broker."

Across the face of this was written the words "Accepted. A. & C."

This instrument or a duplicate of it was sent forward to Fowler Bros. for their acceptance, but they refused to accept it.

The lard was in the warehouse of Kiser & Smith, by whom it was manufactured, at Keokuk, Iowa, and remained there all through the month of March, ready, as the evidence tended to show, to be delivered to defendants by plaintiff in compliance with the terms of the instrument made by D., and accepted by them.

Defendants never recognized any obligations as resting upon them by force of that agreement.

Afterwards D. procured the lard to be delivered to the R. R. Co. at Keokuk, Iowa, which gave bills of lading therefor, and the bills of lading, with a sight draft, were forwarded to defendants for acceptance. Defendants refused to accept the draft. The lard was retained in the warehouse at Keokuk.

In the mean time the price had fallen 1 cent per pound.

E. N. Taft for applt.

C. Van Santvord for respt.

On appeal.

Held, That a comparison of the instruments above set forth shows, as we think, quite clearly that there was no contract between the plaintiff and the defendants.

The instruments executed by the respective brokers are different in material respects. The one delivered to defendants represented a purchase in St. Louis of 700 tierces of prime steam lard—brand Ruddick Kiser & Co.. Terms of payment by sight draft accompanying bill of lading, this sight draft would of course be payable in New York.

The instrument delivered to the plaintiffs represented a purchase for account of defendants of 700 tierces of Kiser & Smith, prime steam lard, delivered in the cars at Keokuk, Iowa, quality to be standard as per rule of St. Louis Merchant's Exchange. There was a difference in the instrument as to the place of delivery, the quality as expressed in the instrument and the terms of the payment, and it cannot with truth be said that in respect to these particulars, that there was ever any agreement or meeting of the minds of the parties.

We think that the court below was right in holding that there was no contract that could be enforced, and that the defendants were entitled to judgment with costs.

Judgment affirmed.

Opinion by *Davis P. J.*; *Brady*, and *Daniels J. J.* concurring.

TOWN BONDS. BONA FIDE HOLDER. ESTOPPEL.

U. S. SUPREME COURT.

George O. Marcy, plff. in error v. The Township of Oswego, in the county of Labette, and State of Kansas, deft. in error.

Decided May 1, 1876.

Where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the bona fide holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive.

In error to the circuit court of the United States for the district of Kansas.

At the trial in the circuit court the plaintiff proved by competent evidence that the bonds, coupons of which were declared upon, were part of a series of bonds for one hundred thousand dollars, voted and issued by the township, and that they were so voted and issued in strict compliance with an act of the legislature of the state, approved February 25, 1870, unless they were voted and issued in excess of the amount authorized by the act. It became, therefore, a question whether, in this suit, brought by a *bona fide* holder for value to recover the amount of some of the coupons, it could be shown, as a defense

to a recovery, that at the time of voting and issuing the series of bonds, the value of the taxable property of the township was not, in amount, sufficient to authorize the voting and issuing of the whole series, amounting to one hundred thousand dollars.

The bonds to which the coupons were attached contained the following recital: "This bond is executed and issued by virtue of and in accordance with an act of the legislature of the said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25th, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at special election duly held on the 17th day of May, A. D. 1870." Each bond also declared that the Board of County Commissioners of the county of Labette (of which county the township of Oswego is a part) had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners and attested by the county clerk of the said county, under its seal. Accordingly each bond was thus signed, attested and sealed. The bonds were registered in the office of the State Auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

The act under which the bonds purport to have been issued, was passed

February 25, 1870. (Laws of Kansas, 1870, p. 189.) The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township in any railroad proposed to be constructed into or through the township, designating in the petition (among other things) the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made: provided that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest.

The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of ballots to be used.

The fifth section enacted that if three fifths of the electors, voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board and attested by the clerk, under the seal of the county.

Held, These provisions of the legis-

lative act make it evident not only that the county board was constituted the agent to execute the power granted, but that it was contemplated the board should determine whether the facts existed which, under the law, warranted the issue of the bonds. The board was to order the election, if certain facts existed; and then the board, and it only, was to decide whether the things precedent to the right to order an election were actual facts. No other tribunal could make the determination, and the members of the board had peculiar means of knowledge beyond what any other person could have.

The order for the election, then, involved a determination by the appointed authority, that the petition for it was sufficiently signed by fifty freeholders who were voters; that the petition was such an one as contemplated by the law, and that the amount proposed by it to be subscribed was not beyond the limit fixed by the legislature; the subsequent issue of the bonds containing the recital above quoted, that they were issued "by virtue of and in accordance with" the legislative act, and in "pursuance of and in accordance with the vote of three-fifths of the legal voters of the township," was another determination not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.

The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three-fifths of the legal voters had voted for the

subscription. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds as upon the question whether that authority should be exercised. They are all, by the statute, referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound, when he purchased, to look beyond the act of the legislature and the recitals which the bonds contained.

The judgment of the circuit court is reversed, and a new trial ordered.

Opinion by *Strong, J.*; *Miller, Davis*, and *Field, JJ.*, dissenting.

EXECUTOR'S COMMISSIONS.

N. Y. SUPREME COURT.—GEN'L TERM.
FIRST DEPARTMENT.

Ireland, applt. v. Corse et al., respts.
Decided May 5, 1876.

Where an executor is allowed by the terms of the will 6 per cent. commission for all money collected by him, the term collection will be construed in its strict and distinctive sense, and will not be held to include moneys received by the executor as the proceeds of a sale of property belonging to the estate, unless it plainly appears that such was the intention of the testator.

Appeal from a decree of the surrogate of New York County, at a final accounting of the executors of the estate of Andrew L. Ireland, deceased.

The only question raised on the appeal is with reference to the allowance by way of commissions, to John B. Ireland, one of the executors named in the will of Andrew L. Ireland, deceased. The fourteenth clause of the said will provided as follows: "I hereby nominate and appoint John Corse, Esq., my

grand nephew, Wm. Jenkins, Esq., and John B. Ireland, Esq., executors and trustees of this my said will, *and I further direct that John B. Ireland shall receive 6 per cent of all moneys collected by him.*"

The testator died seized of a large amount of real estate, and also possessed of personal property appraised at about \$32,000. The will directed that the real and personal property be converted into money. Appellant claimed that he was entitled to 6 per cent. of all the proceeds of such conversion, under the 14th clause of the will above quoted.

Appellant had, prior and up to the death of testator, been his agent for the collection of rent, &c., receiving therefor the sum of 7 per cent. commission on all rents collected. He had in his hands, as appears by the testimony, at the time of such death, the sum of \$5,800, and in the bank \$1,200. The auditor, to whom the accounts were referred, found, as one of his conclusions of law, that the testator did not intend that the commissions should apply to any money except that arising from collections actually made. The appellant claims that he is entitled under the 14th clause to 6 per cent. of the entire estate, real and personal—the proceeds of which came into his hands, in lieu of his commissions, under the statute. The auditor reported that he was unable to determine from the papers before him the precise amount which was collected by the executor, John B. Ireland, and for which he should receive a commission of 6 per cent.

No such claim was allowed by the the surrogate in his decree.

On appeal

Held, That the construction given to the 14th clause of the will by the surrogate is substantially correct; that the

testator did not intend by the provision in question, to give to appellant 6 per cent. of the proceeds of his entire estate, but to give that sum upon such collections as should be made by him, using the word collection in its strict and distinctive sense. In other words, in providing for a sale of his property, and its conversion into money, by his executors, for the purpose of carrying out the provisions of his will, he did not intend that the act should be regarded as a collection entitling appellant to 6 per cent. of the proceeds. The accounting for the \$5,800, which the appellant had before collected, as agent, and which he was bound to make for that money, was not a collection within the 14th clause of the will. There was also, at the time of testator's death, \$1,200, which he had collected and deposited in the bank to his credit. It would seem this sum was in his hands, so as to be chargeable against him as a debt owing by him to the estate, only deposited to his credit.

It deposited to the credit of the testator, as it may have been, the bank became indebted to the estate, and if the appellant subsequently collected that sum from the bank, he would properly be entitled to the 6 per cent for its collection. It was the duty of the appellant to have plainly shown what the facts were with reference to these deposits; and in the absence of proof that the deposit was in the name of the testator, it is proper in this appeal to assume that it was in appellant's own name.

He did not present such evidence to the auditor or the surrogate as shows his right to the 6 per cent. upon any specific collection made by him, if any were so made.

Decree affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concurring.

MORTGAGE. EVIDENCE.

N. Y. SUPREME COURT, GENERAL TERM.
FIRST DEPARTMENT.

Dinkelspiel, et al., *appls.* v. Franklin et al, *respts.*

Decided May 5, 1876.

The finding of a justice at Special Term of a fact entirely outside of the issues raised by the pleadings is error sufficient to reverse the judgment, especially when such findings might have influenced such justice in his finding of a subsequent conclusion of law.

A certificate signed by a mortgagor making certain declarations with reference to the validity of the mortgage is no estoppel as against the mortgagor, where it is not taken in good faith, and placing reliance on its statements, and evidence is always admissible to show whether it was so taken.

Appeal from judgment at special term in equity.

Action of foreclosure. Defense, usury.

The execution of the bond and mortgage by the respondent, was admitted by the answer, in the allegation which precedes each defence set up in answer. namely, that the bond and mortgage set forth in the complaint were made by the defendant, and were by her delivered to James B. Windle, without any consideration whatever, and for the purpose of enabling him to borrow money thereon for the defendant.

The justice who tried the cause, found as a fact that the bond and mortgage were obtained by the mortgagee fraudulently, and that the same were for that reason invalid.

On the trial, a certificate purporting to have been executed by the respondent during the negotiation for, and before the purchase was made by the

plaintiffs, by which the mortgagor declared "that the said bond and mortgage were executed for a good and valuable consideration, and that the entire principal sum of \$6,000, and the interest thereon from June 24, 1871, now remains unpaid on account thereof, and that the same is a good and valid lien upon said premises, for the whole of said principal and interest as aforesaid, and that there is no counter claim or offset against said bond and mortgage, or any defense thereto, in law or equity."

The broker employed by Windle to make the sale was called as a witness, and after stating his employment by him, he was asked the question: "What did he state with reference to the mortgage as to its validity and character?"

This question was objected to and excluded, and plaintiffs excepted. The plaintiffs were themselves called, and were asked respectively whether at the time of the purchase they believed the mortgage to be good. This was excluded, and plaintiffs excepted.

They were severally asked whether they relied upon that statement in making the purchase. This was excluded. They were then asked whether they would have taken the bond and mortgage and would have paid therefor unless the certificate had been furnished, which was excluded.

To these several exclusions exceptions were duly taken.

On appeal.

M. L. Townsend for applt.

Dudley Field for respt.

Held, That the finding of the learned justice to the effect that the bond and mortgage were fraudulently obtained by the mortgagee, and were, for that reason, invalid, is in direct conflict with

the pleadings, and was not, we think, supported by the evidence. For this reason alone we think that the judgment ought to be reversed and a new trial granted.

Because it is impossible to say that the justice was not influenced by his findings upon that question in reaching his second legal conclusion, "that the bond and mortgage were void and should be given up to be cancelled."

Held further, That the exclusion of the evidence sought to be adduced by the various witnesses above mentioned, was error.

It was quite competent to show what statement Windle made to the broker whom he employed to raise money upon the mortgage, with reference to its validity and character, because these statements, if repeated to the purchasers as part of the negotiations, may be properly regarded as the declarations of the respondent's agent, made in the course of a negotiation, as part of the *res gestæ*.

It is also very clear that the plaintiffs were at liberty to show that they acted in good faith in making the purchase of the mortgage, and believed the certificate to have been given in good faith and to be true.

Such a certificate is no estoppel where it is not taken in good faith and placing reliance upon the correctness of its statements, and the party who receives it upon such a purchase as this cannot use it as an estoppel if he himself did not in good faith believe its contents and rely upon its assertions.

Of course a certificate fraudulently obtained from the mortgagor could not act as an estoppel against her, but this court does not find any such fraud nor

could the evidence have justified such a finding.

We think that the judgment cannot be sustained upon any principle of law or equity.

Judgment reversed.

Opinion by *Davis, P. J.*; *Brady and Daniels J. J.* concurring.

FORWARDER'S LIABILITY.

N. Y. COURT OF APPEALS.

Stannard et al., respt. v. Prince, applt.

Decided February 25, 1876.

A forwarder who does an act in good faith, which results in a loss of the goods forwarded, is not liable to the consignee by whom he was employed.

This action was brought to recover freight advanced upon a cargo of marble belonging to defendants. It appeared that in 1865 plaintiffs were doing business as forwarders in the city of Troy, and that they received a cargo of marble consigned to their care at Troy, and directed to defendant at Philadelphia. In November, 1865, defendant employed plaintiffs to secure vessels at Troy for the marble, to pay the railroad charges on it, load it on the vessels, and generally superintend and facilitate its shipment. He wrote to plaintiffs: "I do not mean to limit you in the freight so as to prevent shipping in good season * * * and will expect you to do the very best you can for me in the way of freight, dispatch," &c.

Plaintiffs employed the captain of a canal boat to take the marble to Philadelphia, and shipped it at Troy, December 14. On the 16th plaintiffs learned that the boat was detained at Albany, and on going to ascertain the cause, there found that the proprietors

of the only towing boat company it was then practicable to employ, declined to take the boat unless the captain would pay an old bill for towing of \$75, and \$100 in advance for towing the boat at that time, and that the captain had agreed to do this, and had gone home to procure the money.

Plaintiffs advanced the \$175, and the boat was put into the tow by the employees of the company in the plaintiff's presence, and in turning around, in consequence of the improper manner in which the boat was attached, it was injured and sunk.

Defendant claimed that the transaction at Albany changed the liability of plaintiffs, and that they there assumed the carriage of the goods and the responsibility of carriers.

Smith, Furman & Cowen for respts.
Irving Browne for applt.

Held, That plaintiffs acted as forwarders simply. Story on Bail, § 444; 12 J. R., 232; that in what they did at Albany they simply removed the obstructions to the passage of the boat and enabled it to fulfil the contract already made. Their acts were all in the capacity of forwarders, and in volunteering to make extraordinary exertions they acted at defendant's request, and as it appears, in good faith, for their interest; that the loss was not the consequence of the plaintiff's act, and not in any legal sense caused by it, and that while defendant was not liable for the \$75 advanced for the captain, it was clearly for his benefit and he had no reason to complain.

Judgment of general term affirming judgment for plaintiff on report of referee, affirmed.

Opinion by *Church, Ch. J.*

JURISDICTION. BANKRUPTCY.

U. S. SUPREME COURT.

S. N. Burbank, tutrix of the heirs of Thomas S. Burbank, deceased, *applt.* v. Edmond B. Bigelow, W. W. Bigelow, George W. McDaugall, assignee in bankruptcy of Edmond B. Bigelow, *respt.*

Decided April, 1876.

U. S. Circuit Courts may exercise the jurisdiction conferred upon them by the bankrupt act whenever it obtains jurisdiction of the parties irrespective of the district in which the decree in bankruptcy was made.

Appeal from the circuit court of the United States for the District of Louisiana.

The appellant is the widow and executrix of Thomas S. Burbank, deceased, late of New Orleans, and tutrix of his minor children. She was complainant below, and filed her bill on the 8th of February, 1869, against Edmond B. Bigelow, of Wisconsin, for an account of a certain partnership which she alleges existed between her husband and said Bigelow; and, amongst other things, she specially prays that Bigelow may account for, as part of the partnership assets, the proceeds of a certain judgment for \$13,864.34 which he recovered in his individual name against one Edward W. Burbank, on the 27th day of February, 1866, in the said circuit court. The complainant alleges that this judgment was for a debt due the partnership, and ought to be applied to the payment of the partnership debts, a portion of which, to a large amount, are pressing against her husband's estate.

The court below did not pass upon the merits of the case, but dismissed the bill for want of jurisdiction; upon

what ground does not distinctly appear. The only ground alleged in support of the decree is, that Edmond B. Burbank, the original defendant, together with one Hancock (a former partner of his), shortly before the filing of the bill in this case, filed their joint petition in the district court of the United States for the district of Wisconsin, to be declared bankrupts, and a decree of bankruptcy was rendered against them on the 23d day of January, 1869; but no assignment was made by the bankrupts until the 11th of February, 1869, (three days after filing the bill), when an assignment was made to George W. McDougall, of Wisconsin. In his schedule of assets in bankruptcy, Bigelow refers to the Judgment recovered by him against Edward W. Burbank, but states that it had been assigned to W. W. Bigelow, and conditionally assigned to one Porter for the benefit of creditors.

The court below is supposed to have dismissed the bill for want of jurisdiction, on the ground that the controversy belonged exclusively to the bankrupt court in Wisconsin, as an incident to the proceeds in the bankruptcy of Burbank. It is not pretended that the court had not jurisdiction of the person of the defendants. Edmond B. Bigelow, the original defendant, was duly served with process in New Orleans, and put in an answer to the merits on the first of March, 1869. Thereupon an amended and supplemental bill was filed, and W. W. Bigelow, the alleged special assignee, and George W. McDougall, the assignee in bankruptcy, were made defendants, and duly appeared. W. W. Bigelow formally adopted the answer of Edmond B. Bigelow; and McDougall exhibited the proceedings in bank-

ruptcy, and having by order of the court been subrogated to the rights of Edmond B. Bigelow, filed a separate answer adopting the defense set up by him. Subsequently he filed another answer in which he claimed that the district court of Wisconsin alone had jurisdiction of the case.

During the progress of the cause, on application of the complainant, a receiver was appointed by the court, who collected the amount due on the judgment referred to in the pleadings. The court, therefore, had possession of the subject-matter in controversy, as well as jurisdiction of the parties.

Held, This is a controversy, the termination of which is clearly embraced within the jurisdiction conferred upon the circuit courts by the second clause of section 2 of the original bankrupt act, now section 4,979 of the revised statutes. That this jurisdiction may be exercised by any circuit court having jurisdiction of the parties, and is not confined to the court of the district in which the decree of bankruptcy was made. Therefore, the time when the bankruptcy, or when the assignment was made is totally immaterial. The court, under the bankrupt act, has jurisdiction of the cause as between the assignee in bankruptcy and the complainant, without reference to the citizenship of the parties.

But, inasmuch as the parties were citizens of different states, she might have done this without the aid of the section referred to. The bankrupt law has not deprived the state court of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons; and whenever the state courts have jurisdiction, the circuit courts of the Uni-

ted States have it, if the proper citizenship of the parties exists.

As no other ground was assigned affecting the jurisdiction, we are of opinion that the court had jurisdiction of the case, and ought to have decided it upon its merits.

The decree is reversed, and the cause remanded, with directions to proceed with the case in conformity with law.

Opinion by *Bradley, J.*

CORPORATION. DISSOLUTION.

N. Y. SUPREME COURT. GENERAL TERM,
FOURTH DEPARTMENT.

Lake Ontario Nat. Bank, respt. v. Onondaga County Bank, applt.

Decided April, 1876.

Proceedings under section 36 of art. 2d chap. 8, part 3d revised statutes, cannot be instituted against a dissolved or extinct corporation.

A corporation can only be dissolved voluntarily as provided by statute, and proceedings of the directors not in conformity, are a nullity.

Nothing but an act of the Legislature or the decree of a competent court can dissolve a corporation so as to affect suits, actions, &c.

This was an application at special term for the appointment of a receiver.

A receiver was appointed, and from such order defendant appeals.

Plaintiff was a judgment creditor.

On and prior to the 21st day of February, 1875, the appellant was a regularly organized bank under the statutes of this state providing for the organization of state banks. On or about that day, the directors of said bank, as appears from the affidavit of its cashier and notice of that date by him served upon the superintendent of the bank department of said state, passed a resolution that said bank go into liquida-

tion, be closed, and its business cease on that day, and that its franchise be surrendered, and thereupon the securities deposited with said superintendent be returned.

G. W. Kennedy for applt.

N. W. Nutting for respt.

Held, The proceedings under section 36 of article 2d, chap. 8, part 3d of the revised statutes 2d vol., p. 462 entitled "Of proceedings against corporations in equity," &c., doubtless assumed the actual and continued existence of the corporation; such proceedings could not be instituted and sustained against a dissolved or extinct corporation.

It is claimed on the part of the appellants that the proceedings of the directors and officers of the Onondaga County Bank above stated, operated to dissolve said corporation, and that thereafter no valid judgment could be recovered against said bank, and that it had no officers who could be served with or receive process for that purpose.

This, we think, a mistake. A corporation can only effect its voluntary dissolution in the manner prescribed in article 3d of the title chapter and part of the revised statutes aforesaid. The proceedings of the directors of the defendants' bank were clearly not taken under said article, and are not in conformity therewith and were, therefore, entirely ineffectual to accomplish the dissolution of said corporation and abortive.

The discontinuance of the business of the bank under said resolution could work no dissolution of the corporation. Nothing but an act of the legislature repealing its charter or a decree of a competent court, can dissolve a corporation so as to preclude suits and ac-

tions against it to enforce its debts and liabilities.

This has recently been so expressly decided by the court of appeals in *Kincaid v. Dwinells*, 50 N. Y., 552.

Opinion by *Smith, J.; Mullin, P. J. and Noxon, J.* concurring.

CONTRIBUTORY NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM.

FOURTH DEPARTMENT.

Stockus, respt. v. The N. Y. C. and H. R. R. Co., applt.

Decided April, 1876.

Where a person approaches a railroad crossing it is his duty, before crossing, to take the precaution to look both ways to see and ascertain whether or not a train is approaching, and his failure to do so is negligence.

Appeal from judgment at the circuit.

Plaintiff brings this action for damages resulting from injuries received while crossing defendant's track near Clyde in this state.

Plaintiff approached the defendant's railroad crossing where the accident occurred, riding in a top-covered buggy wagon and covered also with curtains at the side and back, and those were all buttoned down. In sitting in his seat he could not see to the right or left without bending forward.

The highway in which he was traveling ran nearly in the same direction with the railroad, and gradually approached the track, and for the last ten rods was nearly parallel with it.

As the plaintiff approached the railroad in the highway (traveling to the west), at a distance of about twenty rods from the crossing he reached a point where the customary signboard was erected over the highway, and read

the words "railroad crossing, look out for the cars." He then stopped a little east of the signboard and looked out to the east to see if there was anything crossing, and could then, looking east, see about 50 rods on the railroad track but saw no cars approaching, and then started his horse forward.

Moving at the rate of about six miles an hour, (looking west and without looking eastwardly again), and so shut in by the covering of his buggy that he could not easily look in that direction; he traveled from the place where he stopped, seemingly unconscious that while he was passing the intervening distance to the crossing, a railroad train, advancing at the rate of 30 miles an hour, five times his rate of speed would pass 100 rods while he traveled 20 to the point of intersection of the highway and the railroad track. He was overtaken by an advancing train from the east and injured.

Held, That; plaintiff was clearly guilty of such contributory negligence as should defeat his recovery in this action.

That a person approaching a railroad crossing is bound to take the precaution to look both ways and see and ascertain that a train is not approaching the track before he attempts to cross; he must use his eyes and ears so far as there is opportunity.

There is a clear legal duty in one to thus use his eyes and ears. Where one before crossing a track can, by using his eyes and ears, readily see or hear an approaching train, and he fails to take this precaution, he is guilty of negligence clearly contributing to the injury.

Judgment reversed, and new trial granted.

Opinion by *Smith, J.; Mullin, P. J. and Noxon, J.* concurring.

EVIDENCE. FRAUD.

SUPREME COURT OF PENNSYLVANIA.

Stewart v. Fenner.

Decided March 13, 1876.

The range of evidence is necessarily very wide where the issue is fraud; and the same latitude will be shown whether the testimony tends to establish or rebut the fact.

A debtor conveyed all his real estate to his sister. The bona fides of the transaction being at issue, the sister offered to prove that after the conveyance she improved the property at her own expense.

Held, That the offer should have been admitted.

Error to the District court of Philadelphia county.

Ejectment by Catherine Stewart to recover certain properties in the possession of George Fenner. The properties in question were conveyed to the plaintiff by her brother, Robert Stewart, upon the 16th of September, 1868. At the time of this conveyance the defendant held Robert Stewart's promissory note, dated November 5th, 1866, for the sum of \$500, payable in two years and eight months after date. In 1870 Fenner obtained judgment upon this note, and, under an execution upon the judgment, purchased the premises in question at sheriff's sale, and received a deed for the same upon April 15, 1871. Under this deed Fenner subsequently obtained possession of the premises, whereupon Catherine Stewart instituted this action to recover the same. The testimony for the plaintiff, who was a domestic servant, tended to show that she paid a full and valuable consideration for the property, and that the money paid was derived from her wages which she had hoarded in a small box for many years. She

then offered to prove that she had procured buildings to be erected upon the premises, and had paid for the same subsequent to the delivery of the deeds from her brother. Objected to; objection sustained; exception.

Defendant offered in evidence certain judgments against Robert Stewart.

Objected to; objection overruled; exception.

Verdict and judgment thereon for the defendant. Plaintiff thereupon took this writ and assigned for error the above rulings of the court to which exception had been taken at the trial.

Held, The question at issue in the trial below, was fraud in the conveyance of the premises from Robert Stewart to the plaintiff. The range of evidence was, therefore, necessarily wide.

For this reason it was competent to show the debts owing by Robert Stewart as a motive for the conveyance to his sister.

But for the same reasons, it seems to us it was error to exclude the evidence of the improvement of the property by Catherine Stewart after her purchase. It was a circumstance, though slight, to show *bona fides* in the purchase. People do not often improve when they have no confidence in their title. The motive of improving was a question for the jury and not for the court.

An honest attempt to improve, and to pay for the same, is not without force in inducing the belief that the prior purchase was *bona fide*. The evidence ought to have gone to the jury for what it was worth.

Judgment reversed and a *venire facias de novo* awarded.

Per curiam.

CONTRACT. TENDER. MODIFICATION.

N. Y. COURT OF APPEALS.

Levy et al, respts., v. Burgess, applt.
Decided March 21, 1876.

Where, by the terms of a contract a day is named for its performance, and the parties subsequently, and before the maturity of the contract, agree upon a particular hour of the day named and a place for its performance, the latter agreement becomes a part of the original contract, and of the same effect as if therein contained.

*Where state bonds are required to be endorsed by the state, and the endorsement refers to the statute under which they were issued, and "that the undersigned governor * * has hereto set his hand and caused to be affixed hereto the seal of the state," and the seal was affixed, the bonds are well executed by the governor signing his name without the addition of his official designation.*

The terms of a contract requiring the delivery of bonds signed by Smith, as governor, are not met by a tender of bonds signed by Smith, although the latter bonds may be good.

This action was brought to recover damages for the non-performance of a contract, by which plaintiffs agreed to deliver certain bonds to defendant on a day named, when he was to pay them for the same. After the making of the contract and before its maturity the parties fixed upon an hour and place to meet on the day, the contract matured, to perform it.

Theron G. Strong, for respt.

Sidney Smith, for applt.

Held, 1. That this became a part of the contract, and had the same effect as if the particular time and place of performance had been named in the original contract (5 Cow. 506; 14 Barb. 612); and plaintiffs, in order to recover were

bound to show a performance, or offer to perform on their part, at the time and place appointed, or that performance had been prevented or waived by defendant (3 Den. 363; 55 N. Y. 480). It appeared upon the trial that at the hour appointed defendant went to the place agreed upon; plaintiff did not have the bonds, but informed him they had not yet received the bonds; that the person from whom they had purchased them had tendered bonds which they had refused to accept, on the ground that they were not properly indorsed. The bonds in question were to be endorsed by the state of Alabama, and those tendered to plaintiffs had been indorsed by the governor of that state with his own name, without adding his official designation. The instrument of indorsement purported to bind the state. It referred to the statute under which the indorsement was authorized, and *intestimonium* clause recited that "the undersigned governor of the state of Alabama has hereto set his hand and caused to be affixed hereto the seal of the state of Alabama," &c., and the seal of the state was affixed.

Defendant testified that he left and returned in a short time, and then informed plaintiffs that he could deliver bonds for him, signed by Smith, as governor, to M. & T., brokers, up to 2.15 P. M., on that day, who would receive and pay for them. Plaintiffs, before that hour, offered M & T. bonds of the requisite amount, twelve of which were indorsed by Smith, without the addition of his name of office. M. & T. refused to accept them on the ground that defendant had not authorized them to accept bonds so indorsed. The bonds so tendered were owned by one K., who allowed plaintiffs to take them to tender

to M. and T., under an agreement with plaintiffs that if they were accepted by M. & T. plaintiffs would accept them as a good delivery on a contract they had made with K. to deliver them the bonds. Upon the refusal of M. & T. to accept them they were returned to K., who held them for some days, when plaintiffs took and paid for them.

Held, 2. That the indorsement was the act and contract of the state, and not of the persons whose name was attached to it, and the addition of his signature was unnecessary; that delivery of bonds so endorsed would have been a good delivery under the contract with the defendant; that as plaintiffs neither owned nor had in their possession the bonds called for by the contract at the time they were to be delivered, the contract was broken on their part. It was no excuse that K. had not performed his contract with them, or that they had declined to receive the bonds, under a mistake of law; they were in default, and they could not avail themselves of the subsequent tender to M. & T., when defendant gave them permission to deliver bonds on his account to M. & T. they were bound by the contract then imposed, and a tender of bonds of a different description was unavailing. the question whether the bonds tendered to M. & T. were such as defendant agreed to accept was one of fact.

Judgment of general term affirming judgment on verdict directed for plaintiffs reversed, and new trial granted.

Opinion by *Andrews, J.*

LEGACY. CONSTRUCTION OF WILL.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Watrous, applt., v. Smith, respt.
Decided April, 1876.

In construing a bequest under a will, the intention of the testator from the whole will must govern.

A bequest that executors sell all personal and real estate, convert same into money and pay to a person named interest on \$8,000 of sum realized, is a special legacy, and not demonstrative.

Appeal from the decree of the surrogate of Wyoming county.

The will in controversy, after making several specific bequests, provides:

"It is my will, and I do hereby direct, and authorize, and empower my executors hereinafter named, to sell and dispose of my real and personal estate not herein devised and bequeathed, and convert the same into money, as soon as the same can be done without prejudice to the estate; eight thousand dollars to be converted into bonds and mortgages, the interest of which said sum I give and bequeath to my wife, Helen M. Smith, during her widowhood, which is intended in lieu of dower."

The testator died seized of certain estate, in which his wife was entitled to her dower, which constituted the bulk of his estate, she accepted the provision above in lieu of dower, and the real and personal estate was sold and converted into money, and after paying debts, expenses, &c., left in the hands of the executors only the sum of \$5,865.20, for investment in bonds and mortgages, under the foregoing provisions of the will.

There was a hearing before the surrogate, and he decided that the executors invest this sum, or so much as remains after paying expenses, and pay the interest to the widow annually.

M. H. Peck, for applt.

Jas. A. Allen, for respts.

Held, That it is a cardinal rule in the construction of all wills to seek the intention of the testator, and to carry such intention into effect.

That this was, and was designed to be, a specific legacy of the income of securities in bonds and mortgages to the amount of \$8,000, if the testator's estate, after payment of his debts and other expenses, amounted to that sum, and if not, to the income of all the estate remaining, during the life or widowhood of the wife. This was the clear intent of the testator. The fund was to be created by the sale of all his real and personal property, for that purpose, and was to be in lieu of dower.

Instead of leaving the widow to her dower rights in his real and personal estate, he thought it best to merge it with his whole real and personal estate and leave it invested in bonds and mortgages, and give her a specific legacy of the income of \$8,000 from such security, which he doubtless supposed would exceed that sum.

It was the duty of the executor to sell and convert the same into money, and invest and pay the widow the income on the sum of \$8,000, if so much was realized. This was her legacy, and the executors could pay her no other money under the will. The widow was the primary legatee, and stood in equity virtually as a purchaser, by reason of the relinquishment of her dower. She took merely the income and forfeited it by her marriage.

The decree of the surrogate reversed and referred back for resettlement.

Opinion by *Smith, J.*; *Noron, J.* concurs; *Mullen, P. J.*, dissents.

CHALLENGE. DE FACTO OFFICERS.

N. Y. COURT OF APPEALS.

James Carpenter, plttf. in error v. The People, defts. in error.

Decided April 4, 1876.

A challenge to the array of a grand jury on ground that it was not selected by the commissioners of jurors will not be allowed.

The acts of a de facto officer are valid as to the public and the validity of his title to office cannot be drawn in question collaterally.

The plaintiff in error was indicted at the General Sessions of the City and County of New York for the crime of burglary, in the third degree. The prisoner interposed a challenge to the array of the grand jury, alleging in substance that the grand jury was not selected by Douglas Taylor, the Commissioner of Jurors of the County of New York, but was selected by Thomas Dunlap, who had been appointed by the Mayor of New York such Commissioner of Jurors; that the mayor exercised a pretended right to appoint Dunlap, but that the act of the legislature under which he appointed him was unconstitutional. The same challenge was interposed by the prisoner to the array of petit jurors. The district attorney demurred to both challenges, and the demurrers were sustained.

Wm. F. Howe, for plttf. in error.

Benj. K. Phelps, for the defts in error.

Held, no errors; that as to the grand jury under the provisions of 2 R. S. 724 §§ 27, 28, no such challenge could be allowed: as to the petit jury the Commissioner of Jurors appointed by the mayor being a *de facto* officer, his acts were valid as to the public so long as he continued to occupy and exercise the functions of the office; and then the validity of his appointment could not be drawn in question in such a collateral manner.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Rapallo, J.*

SET OFF OF JUDGMENTS.

N. Y. COURT OF APPEALS.

Swift, resp't., v. Prouty, applt.

Decided April 4, 1876.

An assignee of a judgment takes it subject only to such equities as exist in favor of the defendant at the time of the assignment.

Judgments can only be set off on summary application by motion.

If the defendant has any equities against the assignee they can only be asserted by an action.

This was an appeal from an order of the General Term, reversing an order of Special Term granting a motion by defendant to set off a judgment recovered by him against plaintiff prior to the recovery of judgment in this action against judgment recovered herein against defendant. It appeared that the claim upon which this action was brought was assigned by plaintiff to one B. before judgment.

J. E. Cary, for resp't.

Davis & Lyon, for applt.

Held, That plaintiff's assignee took it subject only to such equities in favor of defendant as existed at the time of the assignment; that the claim was not the subject of a set off until the judgment was perfected, and could then only be set off upon summary application by motion as the property of plaintiff, that if defendant had any equities as against the assignee they could only be enforced by action, and could not be asserted by motion. 4 Hill 559; 5 id. 568; H. and D. 112; 10 Paige 369.

Quere as to whether the order was appealable, the application being addressed to the discretion of the court.

Order affirmed.

Opinion by *Allen, J.*

LEASE. FORFEITURE. RELIEF IN EQUITY.

ENGLISH HIGH COURT OF JUSTICE. COMMON PLEAS DIVISION.

Hughes v. The Metropolitan Railway Company.

Decided February 16, 1876.

Equity will relieve a lessee against forfeiture for breach of a covenant to repair when the landlord has by his conduct misled the lessee into supposing that the covenant would not be insisted on.

A lease of certain premises contained a covenant to repair upon six months' notice and a condition of re-entry for breach. The defendants became sub-lessees of the premises under a lease containing a similar covenant. The premises being out of repair, the plaintiff, who was the reversioner, gave notice to the defendants on the 22d of October, 1874, to repair within six months. The defendants wrote to the plaintiff, suggesting that he should purchase their interest, and stating that they should postpone the repairs until they heard from him on the subject. Negotiation thereupon took place with reference to a purchase of the defendant's interest by the plaintiff, and finally the plaintiff wrote on the 31st of December to the defendants, stating that the price they asked was out of all reason, having regard to the expenditure which would be required to put the premises into proper condition, and which the defendants would have to bear under their covenant, and requesting the defendants to reconsider the question of price, and to make some modified proposal. No further proposal was made by the defendants, and though some further correspondence

took place with regard to the premises, the plaintiff never intimated to the defendants that he considered the negotiations at an end. On the 13th of April, 1875, the plaintiff wrote to the defendants' lessor stating that the six months' notice would expire on the 21st. The defendants thereupon caused the premises to be repaired, and the repairs were completed in June, 1875. The plaintiff brought an action of ejectment in respect of the premises, and recovered judgment therein, and the defendants sought relief against the forfeiture by motion under Order 53, why plaintiff should not be restrained from proceeding to execution.

The Common Pleas Division held that the negotiations were finally broken off on the 31st of December, no further proposal having been made by the defendants; that the effect of the correspondence was only to give the defendants a reasonable time for repairing after that period; and that, inasmuch as the interval between the 31st of December and the 21st of April was a reasonable time for that purpose, the defendants were not entitled to relief.

Held, That the true construction of what had taken place was that the notice to repair was suspended during the negotiations; that the negotiations were not finally broken off on the 31st of December, and that the plaintiff by his conduct had misled the defendants into supposing that the notice to repair was still suspended, and that he was not insisting on the breach of the covenant; and, consequently that it would be inequitable to permit him to take advantage of the forfeiture.

Judgment reversed.

Opinions by *James, Mellish, Baggalay, Mellor, and Cleasby*.

APPROPRIATION OF PAYMENTS.

ENGLISH HIGH COURT OF JUSTICE—
QUEEN'S BENCH DIVISION.

Hooper and others v. Keay and Draper.

Decided December 17, 1875.

Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, payments made from time to time by the surviving partners must be applied to the old debt

The plaintiffs supplied goods to K. & D., who were in partnership, and they gave plaintiffs their acceptance for 132*l.*, the amount. Before the bill was due K. & D. dissolved partnership, and gave notice to the plaintiffs with the intimation that K. would carry on the business, and would receive and pay the accounts due to and from the old firm. The plaintiffs continued to supply K. with goods, and he gave them his acceptance for the amount, and also paid them several sums on account, but without any specific appropriation. After some months the plaintiffs sent in their account to K., beginning on the debit side with the acceptance for 132*l.*, and after giving him credit for the sums paid, shewing a balance against K. of 92*l.* After this K. paid the plaintiffs two other sums, which, with the sums already paid, amounted to more than 132*l.* Plaintiffs having sued K. & D. on their acceptance for 132*l.*, D. pleaded payment.

Held, That the plaintiffs having sent in the statement to K., treating the whole as one account, the subsequent

payments must be appropriated to the earlier items of the account; and consequently that the plea was proved.

Opinion by *Blackburn, Quain, and Field. J.J.J.*

AGENCY. WAIVER.

N. Y. COURT OF APPEALS.

Van Allen, *respt.* v. Farmers' Joint Stock Ins. Co., *appls.*

Decided March 8, 1876.

The local agent of an insurance company who has authority to take applications and collect premiums and transmit them to the company, cannot waive compliance with the laws of a policy requiring proof of loss to be made within a specified time, where the policy required all waivers and modifications to be in writing and signed by an officer of the company.

This action was brought upon a policy of fire insurance. Conditions were annexed to it and made part of the policy, one of which provided that in case of loss or damage by fire, the insured should forthwith give notice to the company, and within twenty days give a particular account of such loss, signed and sworn to by him. The policy also provided that "the use of general terms or anything less than distinct, specific argument, clearly expressed in writing and signed by an officer of the company, shall not be construed as a waiver of any written or printed condition or restriction of this policy." No written notice of loss was given by the insured to the company directly, and no particular account of such loss was given until more than two months after the fire.

Plaintiff claimed that the neglect in this respect was waived by defendant's local agent, who was authorized to take applications for insurance and send them to the company, and collect the

premiums and transmit them, having no other authority.

The judge charged the jury that the agent had authority to waive the condition in the policy requiring plaintiff to furnish proof of loss.

Held, error. Judgment of general term affirming judgment for plaintiff upon verdict, reversed, and new trial granted.

Per curiam opinion.

FORECLOSURE. PAYMENT. COSTS.

N. Y. SUPREME COURT. GENERAL TERM, THIRD DEPARTMENT.

James K. Wetmore v. Ira A. Gale, *et al.*

Where the defendant after commencement of the action pays a mortgage but not the costs, and sets up such payment by answer, it cannot be stricken out as sham.

Costs in such an action are discretionary, and it was not certain that the plaintiff would be allowed costs.

After commencement of the action defendant paid the mortgage sought to be foreclosed, but did not pay the costs. He set up this payment, admitted by plaintiff to be true, by answer, which was stricken out as sham.

Held, That this answer should not have been stricken out, the allegation being true, and the plaintiff still retaining the money paid him. Costs in such an action are in the discretion of the court. It was not certain, therefore, that costs would be allowed plaintiff.

Order reversed, with \$10 costs and printing, and the motion to strike out denied.

Opinion by *Learned, P. J.*; *Bockes* and *Boardman, J. J.*, concurring.

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BANKRUPTCY. COMPOSITION.
SECURED CREDITOR.ENGLISH HIGH COURT OF JUSTICE.
CHANCERY DIVISION.*Ex parte* Hodgkinson. *In re* Bestwick.

Decided January 31, 1876.

*A secured creditor is in no way bound by a compounding debtor's estimate of the value of his security.**He is entitled to abstain from proving his debt, or taking any part in the composition proceedings, and, when he has realized his security, he may claim from the debtor payment of the composition upon the balance which may then remain unsatisfied of the debt.*

This was an appeal from a decision of the judge of the Manchester County Court.

Thomas Bestwick and William Bestwick were small-ware manufacturers at Manchester and Salford. On the 29th of November, 1870, they filed a liquidation petition. The first meeting of the creditors was held on the 23d of December, 1870. The statement of the debtors' affairs then produced included in the list of their creditors the names of George Enoch Hodgkinson and Henry Whitten, and stated that they were creditors for the sum of £3,300, as security for which they held a mortgage upon the Paradise Mills at Salford, the property of the debtors, consisting of buildings, engine, boiler, shafting, and machinery, the estimated value of which was £3,300. The mortgage referred to was dated the 7th of November, 1870, and it contained a power of sale. Notice of the meeting was duly given to Hodgkinson and

Whitten. The creditors present at the meeting resolved that a composition of 10s in the pound should be accepted in satisfaction of the debts due to the creditors, the composition to be paid in two instalments of 5s. each, at three and six months from the date of the confirmation of the resolution, and to be secured to the satisfaction of the adjourned meeting. The second meeting of the creditors was held on the 5th of January, 1871, when the resolution passed at the first meeting was duly confirmed, and it was further resolved that the joint and several promissory notes of the debtors and of John Perry should be accepted as sufficient security for the payment of the composition. Due notice of this meeting also was given to Hodgkinson and Whitten. The resolutions were afterwards duly registered.

Hodgkinson and Whitten never proved or tendered any proof in this composition for the £3,300, or any part thereof, nor was any composition thereon paid or tendered to them. The composition was duly paid to the other creditors. The debtors remained in possession of the Paradise Mills and other property comprised in the mortgage deed until the 2d of April, 1872, and during that period they were in correspondence with Hodgkinson and Whitten respecting the sale of the mortgaged premises, and endeavoured to find a purchase for them. On the 14th of July, 1871, they gave the mortgagees a bill for £ 127 16s. 6d., the amount of a half year's interest on the mortgage debt, due in May, 1871. In August, 1871, the debtors sold the loose machinery about the mills (which was not included in the mortgage), and on the 14th of December, 1871, they paid the

mortgagees £651 9s. 5d., part of the proceeds of the sale, in part reduction of the mortgage debt. On the 9th of January, 1873, the debtors filed a second liquidation petition. On the 27th of January the creditors resolved to accept a composition of 20s. in the pound, payable in three instalments of 6s. 8d. each, at four, eight and twelve months from the 10th of February, 1873. This resolution was confirmed at the second meeting of the creditors on the 10th of February, 1873, and was afterwards duly registered. The statement of the debtors produced to these meetings shewed that Hodgkinson and Whitten were creditors for £2,155 17s. 9d., for which they held as security a mortgage on the Paradise Mills, together with engine, boiler, and shafting therein, the value of which was estimated at £2,200. The surplus value of this security, £44 2s. 3d., was in the debtor's statement treated as part of their assets. Due notice of the meetings was given to Hodgkinson and Whitten, but they never proved or tendered any proof in this second composition for their mortgage debt or any part thereof, nor was any composition paid or tendered to them. On the 1st of June, 1873, Hodgkinson and Whitten sold the property comprised in the mortgage for £1228 15s. 4d. On the 23d of August, 1873, they commenced an action against the debtors for the sum of £2151 14s., the balance which they claimed to be due in respect of the mortgage debt. On the 7th of August, 1874, an order was made by the county Court, restraining further proceedings in the action, and directing also a reference to the Registrar of the court to inquire how much, if anything, still remained due to Hodgkinson and Whit-

ten under their mortgage. The Registrar afterwards stated the account between the parties as follows :

	£	s.	d.
Due the 29th Nov., 1870	3354	1	0
Net proceeds of sale	1228	15	4
	2125	5	8
10s. in lb. on £2125 5s. 8d.	1062	12	10
Less proceeds of machi'y	651	9	5
Balance	£411	3	5

The debtors contended that the mortgagees had no right to prove under the first composition, and a special case was settled by the Registrar for the opinion of the court. The case stated the above facts, and the question submitted for the opinion of the court was whether Hodgkinson and Whitten were bound by having elected to stand by their security under the petition of the 29th of November, 1870, or whether they were entitled to payment of the £411 3s. 5d.

The judge was of opinion that the registration of the resolutions operated as a close of the proceedings in the composition, and that the mortgagees, being bound by the composition, could not now come upon the estate for the £411 3s. 5d., and that, as a matter of fact, they had elected to stand upon their security, and were therefore not entitled to payment of the £411 3s. 5d. An order was accordingly made to that effect, and that the costs of the preparation and argument of the special case should be paid by the mortgagees, but no order was made as to the costs of the action.

Hodgkinson and Whitten appealed.

Held, The creditors are, no doubt,

bound by the resolutions, but their security is not impaired. If they do not by means of it obtain payment of all that is due to them, the unpaid balance remains due from the debtors, according to their own plain acknowledgement. The mortgagees are bound by the resolutions, but only to this extent, that if their security is not sufficient to pay their whole debt, they cannot claim more than the composition upon the unpaid balance.

They are not in any way bound by the debtor's estimate of the value of the security.

In a litigation between the debtor and one of the creditors, the creditor cannot be affected by any representation made by the debtor. The creditor is only claiming the composition which is imposed on him by the resolutions. The effect of those resolutions is to make the debtor a free man if he complies with their conditions, and this is what is now asked that these debtors shall do.

The learned judge says that the registration of the resolutions operates as the close of the composition, and that no creditor can after that make any claim against the estate of the debtors. I quite agree that the resolutions operated as a close of the proceedings for a composition, though it is quite a novel expression, but that only means that, as between the debtors and the creditors, it was then decided that the composition should close accounts upon payment of the 10s. in the pound. But I do not agree that the effect of the resolutions was this, that these creditors could not, after they had realized their security, come upon the estate for, or rather claim to be paid by the debtors, the composition in respect of the deficiency which I find by the Registrar's

certificate remains due. Then the second finding of the learned judge is that the creditors have elected to stand on their security. What does that mean? There is not a trace of any evidence to shew that they ever consented to take the security in full satisfaction of their debt. Of course they stood on their security until they sold it to some one else. If they had come in and sought to prove in the composition, they must have valued their security, and they would have been bound by that value, as they would also have been bound, if they had sought the assistance of the court in realizing their security, by the proceedings for that purpose.

I have no doubt that these creditors are entitled now, just as they would have been if they had realized their security before the resolutions, to prove for the balance of their debt, and consequently to receive the £411 3s. 5d. The appellants must have their costs of the proceedings since the date of the agreement to state the special case, and also their costs of the appeal.

Opinion by *Bacon, C. J.*

BROKER'S COMMISSIONS.

N. Y. SUPREME COURT. GENERAL TERM
FIRST DEPARTMENT.

Thomas N. Allis, *respt.* v. Phillipsburg Manufacturing Company, *applt.*

Decided May 5, 1876.

To enable a broker to recover commissions for procuring a contract, he must show that he was the procuring cause of the identical contract which was subsequently entered into by the parties.

Appeal from judgment on a verdict of a jury, and from order denying motion for a new trial on the minutes.

The plaintiff, a broker in railway

supplies, iron, &c., sues the defendant on a contract, alleging that they employed him to obtain for them the contract for building a suspension bridge over the Delaware river at Port Jervis, New York, and agreed to pay him the broker's commissions usual in such cases.

The answer was substantially a general denial.

The evidence was conflicting upon the question whether the plaintiff was instrumental in procuring the contract which was actually made by the defendant for constructing the bridge; defendants asserting that the contract entered into between themselves and third party, one Moorehead, was different from the contract for the construction of the suspension bridge which plaintiff contracted to procure for defendant.

The judge on the trial charged the jury that if they believed that the plaintiff negotiated with reference to another state of facts than that which formed the basis or terms of the contract subsequently made between Moorehead and the defendant, he could not recover, unless his services were the procuring cause of the second contracts being made; that his right to recover compensation depends upon the performance by him of the specific thing, for the accomplishment of which he was employed.

The learned judge further charged as follows, which portion of his charge was made the subject of special exception, which exception was chiefly relied upon in the argument. In commencing the charge the learned judge said to the jury:

"There seems to be no dispute in this case, but that it was through the agency of the plaintiff that the defend-

ant was made aware of the wants of these parties at Port Jervis for the bridge, and that he introduced the defendant to Mr. Moorehead, who was the agent who desired to have this bridge built, and in a general sense it may be said, therefore, that it was through the agency of the plaintiff in making the defendant acquainted with the person for whom the bridge was to be built in the subject matter the defendant ultimately obtained the contract."

On appeal.

Held, That there certainly was evidence sufficient to go to the jury, and no such preponderance on either side as would have justified the court in interfering with the verdict on the grounds suggested. It is undoubted sound law that to entitle the broker to recover commissions, he must show that he was the procuring cause of the sale or contract on which they are claimed to be due, and we have no hesitation in saying that if the plaintiff was employed to procure one contract which he failed to do, and the defendants and Mr. Moorehead, by themselves, afterwards entered into another and different one in respect to which the plaintiff had no agency as a procuring cause, there would be no right to recover commissions.

The evidence in this case was sufficient to justify the court in submitting the question to the jury whether the plaintiff was or was not the procuring cause of the contract actually made, in the sense required by all the authorities.

That although the portion of the charge above referred to may be the subject of some criticism, yet when it is read in connection with other portions of the charge in which it is very distinctly

stated, in substance, that the agency necessary to recover must be the one which resulted in procuring the contract under which the bridge was constructed, those understood, there was no error in the portion of the charge objected to, and no injurious effect of influencing the verdict could have been found from it.

The jury was required to find that the plaintiff's employment related to and covered the period of the contract actually made, and that his agency was the procuring cause of that contract being made, and the jury could not have misunderstood the plain instruction of the court on that subject.

Judgment and order affirmed.

Opinion by *Davis, P. J.*; *Brady* and *Daniels, J. J.*, concurring.

PRINCIPAL AND SURETY.

N. Y. COURT OF APPEALS.

The Atlantic & Pacific Telegraph Co. *respt.* v. Barnes et. al. impl'd, &c., *appls.*

Decided March 21, 1876.

In order to discharge a surety on a bond for the faithful performance of his duties and trusts by the principal, there must be proof that the delinquency of his principal was caused by dishonest conduct or a gross violation of the obligations imposed by the bond.

This action was brought against defendants upon a bond executed by them conditioned that B. one of the obligors who had been employed as plaintiff's agent, would faithfully perform his duties and trusts, and account for all moneys belonging to plaintiff coming into his hands. It was admitted that about one month after the bond was given B. was in default for a small

amount of which plaintiff had knowledge, but failed to notify the sureties of such default, and continued to employ the principal until the default had increased to the amount claimed in the complaint. The nature of the default, or how, or under what circumstances it arose, was not proved. Defendant moved to dismiss the complaint, which motion was denied, and a verdict directed for plaintiff.

Charles Edward Souther, for *respt.*

Samuel Hand, for *applt.*

Held, no error; that in order to discharge the sureties there should have been proof that the delinquency of their principal was caused by dishonest conduct, or a gross violation of the obligations imposed by the bond; that mere indulgence by plaintiff was not enough to discharge the sureties, as the default may have merely been casual and without dishonesty; and if such were the case there was no concealment of material facts or suppression of proper information on his part. 58 N. Y. 541.

Judgment of General Term, affirming judgment for plaintiff affirmed.

Opinion by *Miller, J.*

WARRANTY. MEASURE OF DAMAGES.

N. Y. SUPREME COURT, GENERAL TERM.
FOURTH DEPARTMENT.

Zuller et. al. respts. v. Rodgers et. al. applts.

Decided April, 1876.

In an action for breach of warranty in building a canal boat, the plaintiff can recover, 1. difference between value of boat as she was and as she ought to be; 2. special damages by delays and injuries on first trip before defects could be ascertained.

This action was brought for damages for breach of warranty in sale of a ca-

nal boat. Defendants are boat builders, and sold a boat to plaintiff, agreeing that the boat was in all respects suitable to navigate the Erie canal; that she was properly built and adapted for the navigation of such canal. The breach as set out was that the boat was too high and too wide, and could not safely pass through the locks. The boat was designed to carry wheat. On her first trip she started for Albany with wheat, sprung a leak on the way, and delay was caused, and expense incurred in securing her freight, and transporting it to Albany.

The agreement for purchase of the boat was made before she was completed.

Geo. N. Kennedy, for applt.

D. Pratt, for resp't.

Held, That the damages plaintiff was entitled to recover upon the state of facts herein are

1st. General damages which would consist of the difference between the value of the boat as she and as she was warranted to be. *Cary v. Gruman*, 4 Hill 625; *Passenger v. Thornburn*, 34 N. Y. 634; and 2d. The special damage sustained by delays, detention, loss of time and other injury on this first trip of said boat unavoidably sustained before her defects were ascertained. *Sedgwick on Damages*; 350; *Firk v. Tauk*, 12 Wisconsin 276; *Rose v. Wallace*, 11 Indiana 102; *Milburn v. Billows*, 39 N. Y. 53. No proof of any damages sustained, or for consequential damages from injury to the wheat on said boat was given, or other special damages, except for delays and detention by the way.

The first exception taken by the defendants was based upon the ground that the boat being sold upon an exe-

cutory contract the plaintiffs were bound to discover its defects before delivery, and were concluded by their receipt for the same. This exception was not well taken. The plaintiffs bought with warranty, and the case of *Reed v. Randall*, 29 N. Y. 358, does not apply to cases of warranty. The vendee in such case may receive the property and rely upon his warranty. *Donne v. Dow*, 57 N. Y. 16; *Day v. Pool* id. 52, 416.

Proof showing the value of the use of the boat, horses and crew per day was admissible under the ruling of the Circuit Judge allowing the pleadings to be amended so as to include such damages.

The defendant's counsel excepts to that portion of the charge wherein the judge instructed the jury that in estimating the damage they might take into consideration and allow the expense of unloading, storing and reloading the grain. The judge answered, "Unless he was negligent in not taking the boat on the dry dock at Frankfort Lock." The counsel excepted to the charge with this qualification. The judge then said, "I will ask the jury in writing to find especially upon that fact. To find whether the plaintiffs' agent was negligent in not taking the boat on the dry dock. The first dry dock, in question, below Frankfort." This question was accordingly submitted to the jury in writing, who answered it in the negative. Upon the portion of the charge referred to in this exception, and this question submitted to the jury, they would be authorized to embrace in their verdict the expense as proved of unloading, storing and reloading the 9,100 bushels of wheat said boat contained, which, as the judge states, the proof would amount to \$91 for un-

loading, storage same amount, \$91, and reloading same amount, \$91, making \$273 for work never done, and expenses not, in fact, incurred. I cannot see upon what principle these portions of the charge can be upheld.

The proofs tending to show these facts were also objected to when offered, and received under the objection, and exception by the defendants.

This evidence was clearly inadmissible. It tended to establish an imaginary state of facts, and furnished no proper element of damages.

The plaintiffs were also allowed to prove what the plaintiffs' loss would have been for the delay of the boat and crew while the cargo was being unloaded and reloaded, &c. The reception of this evidence and the charge in respect to it were also erroneous. The jury were allowed to find for four days detention of boat and crew during this period at \$15 a day—\$60.

Assuming that the jury followed and obeyed these instructions of the Circuit Judge in these particulars, their verdict is erroneous to the amount of \$333.—The verdict in excess of this amount is fully warranted by the evidence.

It was proved that it would cost to cut down the cabins so as to make it safe for the boat to pass under the bridges, from \$150 to \$200. This expense with other items of damages, clearly recoverable, would exceed the verdict, which was \$460.

If the plaintiff is content to deduct the said sum from the judgment of \$333 and interest thereon from the time of the rendition of said verdict, then he should be allowed to retain it for the balance, and the judgment should be modified and affirmed accordingly, otherwise the judgment must be reversed and a new trial granted with costs to abide the event.

Opinion by *E. Darwin Smith, J.*

CODE, § 399. PRESUMPTION OF PAYMENT.

N. Y. SUPREME COURT. GENERAL TERM,
THIRD DEPARTMENT.

Alexander, exr., *applt.*, v. Dutcher, *respt.*

Decided May, 1876.

The provisions of § 8, Chap. 276, of the Laws of 1832, are restricted by Sec. 399 of the Code. The pecuniary ability of the defendant does not raise a presumption of payment.

Action by executrix against maker and endorsers of a note which became payable August 17, 1868.

Action was commenced February, 1874. The testator lived until June, 1873. The maker answered separately. The other defendants put in a joint and several answer. One of the endorsers, sworn as a witness for the maker only, was asked "Were you in the habit of borrowing money from the testator from time to time?" Objected to as a transaction between the witness and a deceased person. Excluded. Evidence of the maker on behalf of the endorsers to prove usury set up in their answer was excluded on similar grounds.

E. Cowen, for *respt.*

E. F. Bullard, for *applt.*

Held, that the evidence was properly excluded. The provisions of the act of 1832, chap. 276, are restricted by sec. 399 of the code. The fact that an endorser was responsible, lived near the maker, that the maker was pressed for money, and that the maker lived five years after the note became due, raises no presumption of payment, and the defendant (endorser) is not entitled to go to the jury on the question of payment. Judgment affirmed with costs.

Opinion by *Learned, P. J.*; *Boardman* and *Bockes, JJ.*, concurring.

CONSTITUTION. CONSTRUCTION.

N. Y. SUPREME COURT. GEN'L TERM.

FOURTH DEPARTMENT.

In the matter of the application of the water commissioners of Rochester to acquire title to lands of the Rochester Water Co.

In the matter of the application of the Rochester Water Company to change the route adopted by the Rochester water commissioners, &c., &c.

Decided January, 1876.

In construing the constitution, effect must be given to the intention of the framers, and the construction should be a liberal one where the object is the prevention of abuses and a preservation of the public good.

The provision of the constitution which declares that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act; or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting in it such act" applies to acts referring to existing local or private laws, or to laws appropriating money to pay claims against the state, and is not intended to require that all general laws must be incorporated in all subsequent ones that may have reference thereto.

This is an appeal from an order made at special term refusing the application of the Water Company of Rochester to appoint commissioners to change the route adopted by the commissioners of the Rochester water works, &c., &c.

The proceedings to acquire the lands, &c., of the water company were conducted, in part at least, under Chap. 39 of the Laws of 1875. This act, as is claimed by the counsel of the water company, is unconstitutional because it was passed in violation of the provisions

of Sec. 17 of the constitution of this state. That section declares that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable except by inserting in it such act."

The act referred to above under which these proceedings are taken provides that the proceedings of the commissioners to acquire title to land shall be carried on in conformity to the provisions of the general railroad act, &c., &c.

Held, That in construing the constitution effect must be given to the intention of its framers, and the construction should be a liberal one where the object to be attained is the prevention of abuses or the preservation of public good.

That the abuse sought to be prevented in the adoption of Sec. 17 of the constitution, was the practice that had grown up of incorporating the provisions of existing laws in bills passed by the legislature, by general reference only.

That the intention of the convention that adopted the amendment of the constitution under consideration must be ascertained from the language employed, if possible. Intention not expressed cannot be acted upon, but in case of ambiguity in the language resort must be had to evidence of intention outside of the section of the constitution, in order to enable the court to solve the doubt the ambiguity creates.

That the intention with which the section in question was adopted is manifest, and is to have full effect, unless to give it such effect would produce mis-

chievous results, which, had they been anticipated the section, would not have been adopted. A literal construction would require that in every bill incorporating a municipal corporation the provisions of the revised statutes relating to elections, &c., should be incorporated, and such a construction would embarrass legislation, and give rise to great expense and complication.

That no great abuses were practiced by applying the existing general laws of the state to subsequent ones. The abuses almost invariably resulted from applying existing local or private laws, or laws appropriating money to pay claims against the state to subsequent acts, and the true intent of the convention that adopted the section of constitution under consideration must be held to have applied such section to such last mentioned laws, and not that all general laws must be incorporated in every subsequent law passed, which in any way may have reference to such general laws.

That both the legislature and executive have adopted this construction, as is shown by an examination of the session laws.

Held also, That for the further reason that the water company refused to give the stipulation not to disturb the water commissioners in the occupation and use of the premises sought to be acquired as required by the general R. R. act, an appeal by the owners of the land cannot be brought unless such stipulation is given.

Orders in both cases affirmed.

Opinion by *Mullin, P. J.*

RAISED CHECK. LIABILITY OF BANK CERTIFYING.

SUPREME COURT OF LOUISIANA.

Peter Helvase v. Hibernia National Bank.

Decided May 19, 1876.

Where a bank certifies a check without filling all blanks, and by such omission the check is raised, it is liable in an action to recover the value of such raised check.

The certificate of a bank is equivalent to an acceptance.

Action to recover on a certain check for \$4,150, certified to be good by defendant.

Defense, that the check had been raised after certification, and the date altered.

On the 2d of July, 1874, defendant certified a check of a customer (W.) for \$41. There was a blank after the words "forty-one" which defendant neglected to draw a line through. Afterward said W. filled said blank with the words "hundred and fifty," making it read "forty-one hundred and fifty dollars," and changed the date to the 7th of July. He then, in due course of business passed it to plaintiff, and afterwards absconded.

Judgment was rendered for defendant, and from this judgment plaintiff appeals.

Held, That the bank was negligent in certifying the check without drawing a line with a pen across the blank, thereby enabling the drawer to perpetrate the fraud, there being nothing in the appearance of the check to excite the suspicion of the plaintiff as a prudent man of business.

The certificate of the bank that a check is good, is equivalent to acceptance. 10 Wall, 647.

Judgment of court below annulled and judgment ordered entered for plaintiff against defendant for \$4,150, with interest from July 7, 1874, and costs.

Per curiam opinion.

LIFE INSURANCE. SURETY ON BOND OF AGENT.

U. S. SUPREME COURT.

Jacob Magee and Henry Hall, *pltfs. in error*, v. The Manhattan Life Ins. Co., *deft. in error*. (October, 1875.)

Where a bond is given by an agent, as a condition of his being retained as such agent, conditioned that he will pay over all moneys belonging to the company which he may receive, the sureties on such bond are not exonerated by the fact that the agent made a further agreement at the same time, as required by the company, that all his commissions thereafter earned should be applied to his past indebtedness to the company, of which they were ignorant.

The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases.

This was an action brought by defendant in error, against the sureties upon a bond given by one V., an agent in Mobile, Ala., conditioned that he would pay over to the company all moneys belonging to it which he should receive. It was claimed that he had received moneys which he failed to pay over.

The defence was:

1. That V. had paid over all moneys collected by him after the execution of the bond.

2. That, at the time of giving the bond, V., as such agent, was indebted to the company, and that there was an agreement between him and the company that all moneys received by him should be credited upon this indebtedness; that these facts were concealed from said sureties.

3. That the company required the bond as the condition on which only they would retain V. in their employ;

that the company required a further agreement that all the commissions which V. thereafter earned should be applied on his past indebtedness to the company; that they were so applied; that the sureties were ignorant of the indebtedness and agreement; that if they had been informed of them they would not have executed the bond; and that said agreement was a fraud on them, and avoided the bond as to them.

The defendant in error demurred to the third plea, and the demurrer was sustained. Issue was joined on the first and second pleas. The jury found a verdict for the defendant in error, and judgment was given accordingly.

The question came up on the demurrer.

Held, That the mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The same rule as to disclosures does not apply in cases of principal and surety as in cases of insurance on ships or lives. 10 Exch. 533.

The plea does not set forth any of the circumstances attending the execution and delivery of the bond. It does not aver that there was any misrepresentation, anything fraudulently kept back, or any opportunity to make disclosures on the part of the company, or any inquiry by the sureties before the bond was delivered. Nor is it averred that the company was aware that the sureties were ignorant of the facts complained of. It is, perhaps, to be inferred from the plea that the fact was that the bond was executed at Mobile, and sent by V., by mail, to the company in New York. If this were so, the company upon receiving it was under no obligation to make any communication to the sureties. The validity of the bond

could not depend upon their doing so. The company had a right to presume that the sureties knew all they desired to know, and were content to give the instrument without further information from any source. Under the circumstances it was too late, after the breach, to set up this defence.

There was nothing fraudulent in the agreement. The obligation of the agent was simply to pay over the money of the company which he should receive. This the sureties guaranteed that he would do. To do it was a matter of common honesty; not to do it was a fraud. The agreement of the agent to apply money belonging to him, derived from any source, in payment of a pre-existing debt to the company, had no such connection with what the sureties stipulated for as gave them a right to be informed on the subject, except in answer to inquiries they might have made. They made none, and there was no obligation on the part of the company to volunteer the disclosure.

On both these grounds the plea was bad, and the demurrer was properly sustained.

Judgment at circuit affirmed.

Opinion by *Swayne, J.*

EVIDENCE.

N. Y. COURT OF APPEALS.

Scholey, exr., &c., *respt.* v. Mumford, et al., *appls.*

Decided April 4, 1876.

Evidence to show that payment of money was involuntary is admissible where the fact is material and is put in issue by the pleadings.

This was an action to recover as for moneys had and received by defendant under circumstances set forth in the complaint substantially as follows :

Plaintiff and M. were executors of the estate of plaintiff's wife. Upon a final accounting before the surrogate, by his decree, certain U. S. bonds of the par value of \$5,000 were reserved and left in the hands of M. to meet certain annuities provided for by the will. M. died and defendants were appointed his executors, and said bonds came under their control. They refused to deliver them up to plaintiff until he paid a sum which they claimed due the estate of M. for commissions and advances, which claim, plaintiff alleges, was unjust and they disputed; that plaintiff, in order to obtain possession of the bonds paid the claim, although defendants had no right thereto, which sum he sought to recover back in this action.

Defendants' answer, as construed by the court, admitted that the payment of the claim for commission and advances was required as a condition for the delivery of the bonds, but alleged that the account therefor as claimed by defendants was delivered to and examined by plaintiff and admitted to be correct.

This allegation defendants offered to prove on the trial, but the offer was rejected.

F. A. Macomber for *respt.*

Geo. F. Danforth for *applt.*

Held, error; That the averment in the complaint that the claim was disputed was necessary to show that the payment was involuntary, and it was put in issue by the averment in the answer. Defendant therefore had a right to introduce evidence bearing upon it.

Judgment of general term, affirming judgment for plaintiff reversed, and new trial granted,

Opinion by *Rapallo, J.*

CONTRACT. EVIDENCE. GENERAL DENIAL.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Manning, *respt.* v. Eckert, et al., *appls.*
Decided April, 1876.

Where a plaintiff proves a part of a transaction, the defendant, even under a general denial, can prove the whole transaction.

Evidence to repel a presumption is not evidence to prove new matter.

Appeal from judgment and order denying new trial.

The plaintiff in his complaint claimed to have sold and delivered to the defendants barley malt at and for the price and of the value of \$378.78, for which the defendants agreed to pay.

At the trial the plaintiff gave evidence sufficient, *prima facie*, to entitle him to recover for 250 bushels of barley malt delivered to the defendants, and rested.

The defendants then under the general denial of their answer offered to prove the contract under which said barley was delivered, and to show that it was part of 5,000 bushels of barley malt which the plaintiff had agreed to sell to the defendants, and that after the delivery of said 250 bushels of said barley, the plaintiff refused to deliver the residue of said barley.

The circuit judge held that although the evidence so offered tended to establish a valid defence, yet such defence was not admissible under defendants' answer of a general denial, and overruled such offer and directed a verdict for the plaintiff for \$413.17, to which ruling and decision the defendants' counsel duly excepted.

Held, error. The defendants' proof was simply directed to disprove the

plaintiff's cause of action and to meet the plaintiff's evidence.

Where a plaintiff shows a part of a transaction on contract or gives evidence sufficient in respect to it as to authorize a verdict, or to imply a contract, the defendant must be entitled to prove the whole transaction under his general denial, and to show that the plaintiff has no cause of action.

Evidence simply directed to repel a presumption or to show an express contract to displace an implied one, set up and proved, is not evidence to prove new matter.

New matter, as this phrase is used in section 149 of the Code, means matter extrinsic to the matter set up in the complaint as the basis of the cause of action.

The defendants in this case sought to show the whole contract between the parties in respect to this barley-malt and that by the terms and force of such contract, the plaintiff had no right of action.

This right to do so under his general denial of the plaintiff's cause of action seems to me quite plain, and is supported, I think, by abundant authorities, among others by *Andrews v. Bunce*, 16 Barb., 633; *Schmer v. Van Allen*, 18 Barb., 21; *Beatty v. Swarthaut*, 32 Barb., and *Boomer v. Koon*, 13 Sup. Court Rep., 645.

Judgment should be reversed and a new trial granted, with costs to abide the event.

Opinion by *E. Darwin Smith, J.*

Mullen concurs in result upon the principle of *stare decisis*.

LANDLORD AND TENANT.

N. Y. COURT OF APPEALS.

Becar, *respt.* v. Fleres, *exr.*, &c.,
applt.

Decided April 5, 1876.

A parol lease vests in the lessee a present interest in the premises from the time the lease is made. It is not an executory contract.

This action was brought to recover rent claimed to be due. It appeared that defendant's testator, who had been in possession of certain premises under a written lease, in February or March, 1874, leased the premises by parol of plaintiff, by her son, for one year from the 1st of May thereafter. The testator died in April, 1874, and his family not desiring to retain the house, defendant notified plaintiff, and on the first of May they abandoned possession of it and tendered the key, which was declined. It was proved by defendant that plaintiff might have rented the house for nearly as much as defendant's testator was to pay for it.

A verdict was directed for plaintiff. Defendant claimed that between the making of the contract and the time for taking possession, the contract was executory, and defendant having refused to perform it, plaintiff could only recover the actual damage, which within the general rule, plaintiff was bound to make as small as possible.

Edwin More for *respt.*

Wm. W. Badger for *applt.*

Held, That the contract was not executory; that the parol lease vested in defendant's testator a present interest in the term which was assignable before entry, and upon which an action of ejectment could have been brought if possession had been withheld, 1 N. Y., 307; 8 id., 115; and when plaintiff re-

fused to rescind, defendant still held the term and was liable for the rent.

Judgment of general term, affirming judgment on verdict, affirmed.

Opinion by *Church, Ch. J.*

TRUST. DELIVERY TO
TRUSTEE.

N. Y. SUPREME COURT. GEN'L TERM.
THIRD DEPARTMENT.

Lambert v Freeman, et al.

Decided May, 1876.

Where money of one is already in the hands of another, the owner may create a trust with regard to such money without further delivery to the holder, provided the trust is sufficiently proved.

Action to recover moneys remitted by R. to F., one of the defendants, in 1863 and 1864, and which plaintiff claimed had been given to her by R.

R. was deceased at the time of the trial. The defendants are his administrators. On the trial it was decided on the evidence that R. created a trust in F., for the benefit of the plaintiff, the income to be paid her for life, and that, subject to the trust, the principal belonged to the heirs and next of kin of R.

All parties appealed from the judgment.

C. S. Lester, for plaintiff.

John H. McFarland & Henry Smith,
for defts.

Held, That the decision of the court below was correct, upon the facts.

After the plaintiff rests it is too late for the defendant to move to strike out evidence. Where money of one is already in the hands of another, the owner may create a trust with regard to such money, without further delivery to the holder, provided the trust is sufficiently

proved. The mere existence of the power to revoke or recall this trust, if he did not exercise it, does not prevent its validity. The defendant, F., should not, up to the judgment, be charged with interest at any greater rate than the donor tacitly consented that he should pay; as, although he had invested the money in his own business, it was done without objection on the part of the donor. Nor should he be charged with costs up to judgment.

Judgment affirmed with costs.

Opinion by *Learned, P. J.*

BOND AND MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM.

FOURTH DEPARTMENT.

Smith, resp. v. Smith, applt.

Decided April, 1876.

An agreement made prior to the bond in suit, although it refers to it, cannot control it.

Extra allowance of costs are in the discretion of the lower court.

This action was brought on a bond in the penal sum of \$12,500 and conditioned to pay the sum of \$10,050, and also on two notes given by defendant to plaintiff.

The answer, as one of the defences, sets out an agreement between plaintiff and defendant and one Hungerford, and bearing same date as said bond, by which H. agreed to assume and pay certain liabilities of defendant, and defendant agreed to secure them separately by a bond and mortgage of \$5,000 to H., according to certain figures then present, and by a bond and mortgage to plaintiff for an amount not then fixed, said papers to be executed and delivered and arrangements to be completed within 15 days from that date.

The answer then alleges that on Sep-

tember 17, 1859, the sums assumed by the plaintiff and secured by the defendant having been ascertained and agreed upon at \$10,050.23, the defendant then executed the bond in suit according to agreement of July 25, 1859, and dated back to that date.

A. Coburn for applt.

N. E. Kernan for resp.

Held, That the bond was *prima facie* evidence of the amount claimed to be due upon it, and the burden of proof was cast upon defendant to repel such presumption.

That the agreement made and executed between these parties and Hungerford, July 25, previously to the actual giving of the said bond and mortgage, does not affect, in the slightest degree, the subsequent transactions between the parties, and the giving of said bond and mortgage on September 17; that the transaction as to the agreement with H. and the subsequent giving of the bond and mortgage were properly held by the referee as two independent agreements.

The court at special term allowed plaintiff an extra allowance of costs, of \$500.

Held, That the question of an extra allowance was a question particularly directed to the discretion of the court at special term, and this court should not interfere except in a clear case where the discretion has been abused.

Judgment affirmed.

Opinion by *Smith, J.*

BURGLARY.

N. Y. COURT OF APPEALS.

McCourt, plff in error v. The People, defendants in error.

Decided April 11, 1876.

In order to convict of burglary a breaking and entering with a felonious intent must be shown.

The plaintiff in error was indicted for burglary and larceny, and sentenced to state prison for two years. It appeared that plaintiff in error, who was partially intoxicated at the time, in company with two other young men, drove up one morning between 8 and 11 o'clock to the house of one C. where he had been in the habit of procuring cider. As the party drove up to the house one of them gave a call, and C., being away from home, his daughter came to the door. Plaintiff in error asked for some cider, said he would pay for it; the request was refused, and the girl told him they had none; that her father was away and they could not have any.

The prisoner said he would have some, and went down into the cellar of the house and broke a faucet of a cider barrel and got some cider in a pail, which was pulled from his hand by one of his companions and left in the cellar.

The cellar had double outside doors about eighteen inches apart, one opening outwardly and the other inwardly, through which, the evidence showed, the prisoner gained admission.

By the breaking of the faucet a large quantity of cider leaked out, for which the prisoner and his companions afterwards paid C.

The people gave in evidence the declaration of the accused to the prosecutor a short time after the transaction upon the settlement of the civil damages, in answer to the inquiry what his object was in so conducting himself at the house, that he was rum crazy.

The court was requested by the counsel for the accused to direct an acquittal, and refused.

Samuel Hand for plff. in error.

N. C. Moak for defts. in error.

Held, That the conviction was erroneous; that the evidence did not justify an inference that the accused acted with a felonious intent; that there was not only an absence of the usual *indicia* of a felonious taking, fraud, stratagem or stealth, but all the circumstances proved are consistent with the view that the transaction was a trespass merely.

That in order to convict the accused it was necessary to prove that he broke into and entered the cellar with intent to steal the cider.

Judgment of general term, affirming judgment of conviction, reversed.

Opinion by *Andrews, J.*

PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM.

THIRD DEPARTMENT.

Oliver Peake v. Calvin H. Bell.

Decided May, 1876.

A verdict cannot be set aside as against evidence where the defendant has not moved for non-suit nor asked the court to direct a verdict in his favor.

Action for conversion. The jury found a verdict for the plaintiff. The verdict was set aside as against evidence. No motion was made by the defendant at the end of the plaintiff's case, or of the trial, for a non-suit; nor was any motion made that the court direct a verdict for the defendant. A motion was made and denied that the court direct a verdict for the plaintiff. The plaintiff appeals from the order setting aside the verdict.

Youmans & Niles, for applt.

C. H. Bell, for resp't

Held, That a failure to move for a non-suit, or to ask the court to direct a verdict for the defendant, is an admis-

sion that there is sufficient evidence to go to the jury, and that the defendant is thereby precluded from moving to set aside the verdict as against evidence. Order appealed from reversed with costs.

Opinion by *Learned, P. J.*; *Buckes & Boardman, J. J.* concurring.

WRIT OF NE EXEAT.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Rose Viadero, *respt.*, v. Manuel Viadero, *applt.*

Decided May 26, 1876.

The practice with reference to the writ of ne exeat requires the special allowance of the writ by an order of this court, and there should be an endorsement upon the writ by the clerk, showing the amount in which the defendant should be held to bail.

The liberal provisions of §§ 173, 174, of the code, with reference to amendment, applies to the writ of ne exeat.

Appeal from order denying motion to set aside a writ of *ne exeat*.

The writ was allowed to issue upon the verified complaint in this action, which has been brought for a divorce because of the adultery of the defendant. The facts alleged are sufficient to constitute a good cause of action in the plaintiff's favor, and they are not controverted. The facts set up in the complaint, verified as an affidavit, and which were made the basis of the writ of *ne exeat*, are as follows: That defendant told plaintiff he intended to leave the city, and he has so told many of his friends; that he has no tie to this city or state, and from the abandonment of plaintiff, and the refusal of defendant to do anything for the support of plaintiff, she is satisfied he intends to leave the jurisdiction of this

court, and will so leave unless restrained by order of this court. He is in the Havana trade, and can readily go there, and so avoid plaintiff altogether.

The writ of *ne exeat* was signed by the justice, and the bail fixed at \$2,000.

The grounds upon which the motion to vacate the writ was made were as follows:

1. The writ or paper by which the defendant was arrested was void, because it is not in form of an order entered in this action, and there is no order directing such writ to issue.

2. It is not in form a writ of *ne exeat*; it is not issued by the clerk of the court, under his hand, nor is it subscribed by plaintiff's attorney. The court can allow a writ of *ne exeat*, but the clerk of the court, not a justice thereof, issues the writ.

3. The allegations in the complaint are insufficient to sustain the writ.

C. Burling, for *respt.*

Geo. Bell, for *applt.*

Held, As the plaintiff appears to have a meritorious cause of action, and she may be deprived of substantial redress by dismissing the writ, that should not be done if it can be consistently sustained. And, that it may be, will appear from the inference which is warranted by the facts alleged. From the business the defendant was engaged in his interest would appear to take him to Havana, in case of his leaving the city of New York. And that he contemplated leaving is shown by his statement to that effect, made to the plaintiff.

The practice prior to the Code with reference to the writ of *ne exeat* still prevails, and that practice requires the special allowance and order of this court, together with an endorsement upon the

writ, by the clerk, showing the amount in which the defendant should be held to bail, for the purpose of regularly issuing it. In that respect the preceding practice has been continued, and is still required to be observed. (2 Barb. Chy. Pr. 2 ed. 650-51; Code 469.)

This practice was not formally pursued as it should have been in issuing the writ in this case. But its important requisites were, which were the adjudication of a justice of this court upon the fact that the writ should be issued, and determining the amount of bail to be required to entitle the defendant to be set at liberty after his arrest.

That the informalities of the writ, which have in no way prejudiced the defendant may be cured by amendment. (§§ 173, 174.)

An order should therefore be made reversing the order appealed from, and setting aside the writ, unless within ten days after the decision of the appeal in this case the plaintiff shall procure and cause to be entered *nunc pro tunc*, a formal order and allowance of the writ, and have the endorsement upon it of the amount of bail required by it from the defendant.

And in case of a compliance with this direction, then the order appealed from should be affirmed without costs.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

APPOINTMENT OF PUBLIC OFFICER.

N. Y. SUPREME COURT. ALBANY SPECIAL TERM.

The People ex rel. James Kilbourn v. James Allen.

Decided May, 1876.

In a list of appointments sent by a Mayor to the Common Council for

confirmation were the names of two members of said common council. Held, That that fact alone does not show that the Mayor thereby bribed said members to vote in favor of confirming the rest of the appointments. The appointees were confirmed by a single vote, and in gross. Held, the confirmation was valid.

At the next meeting of the common council the Mayor sent in new appointments, in the place of the two members of the Common Council, who had in the meanwhile refused the nominations, and the board thereupon confirmed said new appointments, together with those acted upon at the previous meeting, with the exception of those refusing, by a single vote and in gross. Held, That the Common Council had not exhausted its power by the action taken at the previous meeting.

By the charter of the city of Albany the street commissioner is appointed by the mayor and confirmed by the common council. He holds his office for two years, and until his successor has been "appointed and duly qualified."

The respondent, James Allen, was so appointed in the year 1873, and now claims to continue in office because, as he alleges, his successor has not yet been "appointed and duly qualified." The relator, Kilbourn, claims the office thus: On April 17, 1876, the then mayor of the city, Mr. E. L. Judson, sent to the common council a communication in writing, by which he nominated several different officers, and upon that list of names was that of the relator, who was named for the office of street commissioner. Among the parties thus nominated by the Mayor were the names of Frederick Andes and Peter C. Lauder, who were then Aldermen of the city, the former being designated for the position of Excise Commissioner, and the latter for that of City

Marshal. When the communication was received, a motion was made to adjourn, and Alderman Cavanaugh, who was then in the chair, declared the motion carried. An appeal from the decision, as announced by the chair, was immediately taken, which Cavanaugh refused to put, and then left the chair and the room, the Clerk, Martin Delchanty, following him. After they had left the room, Alderman Luby was called to the chair, and the appeal was sustained by nine votes, a full board consisting of sixteen members. A clerk was also made, and, on motion, the several nominations of the Mayor, among which was that of Kilbourn, the relator, were confirmed by a single vote taken upon all together, nine votes having been cast in favor of such confirmation.

Kilbourn then qualified before the Mayor, and filed his official bond. On the 24th of April, 1876, the Board of Aldermen again met, Alderman Cavanaugh in the chair. The minutes of the preceding meeting, April 17th, 1876, were so amended and adopted as to show the facts of that meeting, as hereinbefore stated. A communication was received from the Mayor that Messrs. Andes and Lauder had each refused the office to which he had been appointed, and nominating Charles Kirchner for Excise Commissioner, in the place of Mr. Andes, and Mr. Augustus T. Fisher for City Marshal, instead of Mr. Lauder. These nominations, together with those acted upon at the meeting of April 17th, except those of Andes and Lauder, were then confirmed by a vote of nine to six. The vote was a single one upon all the names together. After this reconfirmation, the relator, Mr. Kilbourn, again qualified as street commissioner. Since that time he has endeavored to perform the duties of the

office, and on April 27th demanded of Mr. Allen certain books and papers belonging to the office, which were refused. After such refusal this proceeding was instituted.

In answer to the application, the respondent, Mr. Allen, claims that the appointment of Mr. Kilbourn was illegal and void, because the naming of two men for offices who were members of the Common Council, was an offer of a bribe to them to vote for the confirmation of others, and because the attempted confirmation of all by a single vote was illegal and void; whilst the alleged reconfirmation of April 24th was also illegal and void, because having once voted upon the confirmation of those officers at a previous meeting, the power of the board was exhausted, and no new vote could legally be had; and also because the confirmation was obnoxious to the previously stated objection that it was by a vote in gross, and not by one upon each separately.

Messrs. G. Tremain and M. Hale for Kilbourn.

Mr. N. C. Moak for Allen.

Westbrook, J.—It was at one time held (*Devlin v. Conover*, 5 Abb. 74) that upon such a proceeding as this, the officer before whom it was pending had no right to look beyond the actual possession of the office—that in any case when the one or the other was conducting the office he would not be interfered with. The effect of this doctrine was, however, to nullify the statute, for in every case an incumbent could defeat his successor by refusing to surrender the position, and then in every case the party claiming an office would be compelled to resort to a writ of *quo warranto*. The bet-

ter opinion now seems to be that when the case is free from reasonable doubt the application should be granted. (North v. Cary, 4 N. Y. Sup. Ct. Rep. 357.)

Neither is this a proceeding in which the title to the office is to be tried. If the office was an elective one, and the result had been declared in favor of the applicant for books and papers, the officer upon this proceeding would not go back of the result as declared to investigate the legality of the votes cast, nor the bribing of votes. Neither in the case of an officer appointed by an executive and confirmation by a board should the officer to whom this application is made go behind the appointment and confirmation to investigate the fraud and corruption, even if that would vitiate the appointment, or the evidence was sufficient to justify the charge. An application under the statute for books and papers is designed to be a summary proceeding, and the officer to whom it is made has no power, in my judgment, to declare action of the appointing and confirming power void for official corruption, especially when there is no clear proof of the fact. It is a statute proceeding strictly, and no power can be exercised beyond that actually conferred. On the merits, however, of the allegation, we observe that it may be true that the nomination of Andes and Lauder was intended to improperly influence them in their votes upon other nominees, and it may also be true that they were selected on account of their eminent fitness for the positions to which they were nominated, and that the idea of thus influencing their votes never occurred to the officer who made the appointment. If corruption and fraud

could be inferred from the mere nomination, then whenever the governor of the state sends to the senate, of which a majority is of adverse politics, the names of several persons, some of whom profess a political belief similar to that of the appointing power, and others whose views are identical with those of the senate majority, then it might be argued that the executive offered his political opponents a bribe to secure their votes in favor of his own friends. Such a conclusion would be unjust and unfair, and there is no distinction between the supposed case and the real. In the one it may be said that the confirming power is bribed by favors bestowed upon friends, and in the other by favors bestowed upon themselves. The alleged bribery in the one case is the same as in the other in kind, and differs in degree only. Every nomination should stand or fall upon its own individual merits, and, perhaps, in a very strict sense the practice in either case should be condemned, but actual corruption could not be inferred from the simple acts.

The remaining objection to the application is that the confirmation of the nominations, including that of street commissioner, was in gross and therefore void. The statute (section 10 of title 3 of charter,) does not prescribe the manner of confirmation. It simply says: "the Mayor, with the consent and approval of the Common Council of the said city, shall biennially appoint * * * one Street Commissioner," etc. That "consent and approval" is simply to be expressed. If by a single vote "consent and approval" is given to several appointments, it would be difficult to say none had been expressed. If I say I consent

to and approve of the appointment of A. to the office of Chamberlain, of B to the office of Deputy Chamberlain, etc., expressing it in writing and subscribing it by name, it would be difficult to say it was not as effectual and valid an approval as if I had subscribed two papers. And when a Common Council is to "consent and approve," and does consent to and approve, of several appointments by a single resolution, I see no reason to doubt the validity of the act. It is certainly the daily practice thus to express consent, and I should be reluctant to hold that such "consent and approval" were void. There may be reasons why more strictly legislative action cannot be thus conducted, and upon that point no opinion is expressed; but I cannot hold that the law has been violated, and that so many officers have discharged duties illegally and drawn salaries unlawfully, as certainly have if this point of the respondent is well taken.

It was not claimed or argued that the pretended adjournment of April 17th was legal. It clearly, however, was not. A Chairman and Clerk cannot override the will of a majority of the Common Council, which they undertook to do. I regard the confirmation of April 17th, 1876, as valid, despite the attempted adjournment, and if it was not, the subsequent action of the 24th of the same month, being a regular meeting, certainly was. If, as the counsel for the respondent alleges, the action of the 11th was void and no action, because of bribery and corruption, then that of the 24th which was not obnoxious to that objection, was clearly proper.

The approval and consent of the Common Council expressed by their vote

of the 17th, the counsel argues must be treated as null by reason of the proffered bribe (and he must take that position to make his point, for if voidable only, there is no power vested in me as a judge—an officer merely—to declare it void), then no pretended action on that day had exhausted the power of the Common Council in the premises, and they were free to act upon the 24th.

That which is void is nothing, and to claim that power has been expended, where none has been executed is the claim of a legal impossibility.

My conclusion is that the order asked for must be granted.

PRACTICE. SUMMONS.

N. Y. SUPREME COURT. GEN. TERM
FOURTH DEPARTMENT.

Strong, *applt.* v. Dana, *respt.*

Decided April, 1876.

In an action arising out of an alleged breach of covenants of seizin a summons for money demand under subdivision 1 sec. 129 of the code, is not proper; it should be under subdivision 2.

The summons in this action was served without a complaint, and was for \$918 83; the complaint which was afterwards served set forth a cause of action for damages for breach of warranty and of covenants of seizin.

A motion to dismiss the complaint on the ground that it did not conform to the summons was made and granted.

Jas. C. Strong, for *applt.*

Willard Bartlett, for *respt.*

Held, the decision at the Special Term was clearly right. The action was commenced by the service of a summons and the complaint did not conform to the summons previously served. The summons was under the first sub-

division of section 129 of the code, and the complaint sets up a cause of action for a breach of the covenant of seizin in a deed and seeks to recover damages in the sum of \$918 83 for such breach. The summons clearly should have conformed to the second subdivision of sec. 129, and concluded with a notice that the plaintiff would apply to the court for relief demanded by the complaint.

The phrase in the first subdivision of said section *for the recovery of money only*, means for the recovery of money upon some specific promise to pay a definite sum of money upon an express contract, or upon a contract implied to pay a liquidated sum of money, or debt, acknowledged.

The order should be affirmed.

Opinion by *E. D. Smith J.*; *Mullen P. J.* and *Noxon, J.* concurring.

DEED. COVENANT AGAINST INCUMBRANCES. EFFECT OF

N. Y. COURT OF APPEALS.

De Peyster, respt. v. Murphy, applt.
Decided May 23, 1876.

Where a deed contains a covenant that the premises conveyed are free from all taxes, assessments, &c., the grantor is bound to pay an assessment which has been levied but not yet entered so as to become a lien upon the property under the statute.

This was an action to recover the amount of an assessment for a street pavement in the city of New York.

Plaintiff conveyed the premises, December 5, 1870, to defendant by a deed in which he covenanted that the premises were "free, clear, discharged and unincumbered of, and from all charges, * * * taxes, assessments and incumbrances." The work on the assessment had been completed prior to May

3, 1870, and the assessment was confirmed November 7, 1870, and the premises were put down in plaintiff's name in the assessment list, and the amount assessed against him. It was not entered in the title-book of assessments in the bureau of arrears until December 24, 1870.

Plaintiff claimed that the amount did become a charge until it was there entered according to the provisions of the laws relating to the collection of arrears of taxes, assessments, &c., in the city of New York, (laws 1853, chap. 579, § 6; Laws 1871, chap. 381 § 1,) and therefore he was not liable to pay it.

The statutes in question provide that no assessment for any city improvement shall be deemed to be fully confirmed so as to be due and a lien upon the property included in it until the title thereof, with the date of confirmation, shall be entered as required.

After the assessment was entered, plaintiff paid it under an agreement with defendant that the latter would return the money if plaintiff was not legally liable to pay it.

John E. Parsons for respt.

Chas. E. Crowell for applt.

Held, That as the covenant in plaintiff's deed included all charges as well as taxes and assessments, although an assessment made and confirmed was not a lien for the purpose of the statute, it was, nevertheless, a "charge" against plaintiff which incumbered the premises, and against which he was bound to provide.

That the improvement having been made when the contract was entered into, and plaintiff being in the full enjoyment of the benefits arising from it, it constituted a portion of the value of

the premises, and entered into the consideration upon the sale thereof.

That it was then a lawful charge against plaintiff and the property, and a binding obligation which could only be removed by a discharge; and being a charge against the person and the property, it was fairly embraced within the meaning of the covenant without regard to the question whether it was a lien under the statute.

Also held, That plaintiff was bound to pay the assessment as the person against whom it was made and entered. R. L. 183, § 175, 186; 2 Kern., 140; 4 Seld., 420, 433; 2 Pa., 434; 45 Barb., 150.

Dowdney v. Mayor, &c., explained and distinguished.

Judgment of general term, affirming judgment on verdict directed for plaintiff, reversed, and new trial granted.

Opinion by *Miller, J.*

ASSESSMENTS. SERVITUDES.

N. Y. SUPREME COURT. GENERAL TERM,
THIRD DEPT.

Water Commissioners of Poughkeepsie, v. Owners of Lands.

Decided May, 1876.

Where commissioners have made expenditures upon lands to which they have not acquired title the assessments made for the benefits conferred cannot be supported (*People v. Haines*, 49 N. Y., 587, followed).

Appeal from an order denying motion to confirm the reports of commissioners assessing benefits on owners of lands, by reason of taking away certain dams and improving the Fallkill.

Commissioners were appointed under an act of the legislature to ascertain and

appraise the compensation to be made to owners of the dams and ponds, and awards were made to them. A channel was excavated and walled up in the lands uncovered by the removal of the dams, and in some places the channel of the stream was changed. This was done under the direction of the Water Commissioners. Subsequently commissioners were appointed under an act to assess upon the owners of lands adjacent the benefits conferred upon them by the removal of the dams, and the excavation and walling up of the stream. This act did not fix the amount to be assessed, and under it the commissioners might have assessed any amount for such benefits.

Thompson & Weeks, for applts.

Henry M. Taylor & O. D. M. Baker, for respts.

Held, That the water commissioners having acquired the right to the dams and ponds, and having removed the dams, abandoned the servitude of flowage. They did not by the purchase of the dams and water privileges, acquire any title to the land left uncovered. This became the property of the owners relieved from the servitude of flowage. The water commissioners then had no title to the land in which the channel was built and the excavation made. The assessments were made to pay for this expenditure, and cannot be supported under the doctrine of *People v. Haines*, 49 N. Y. 587. It seems that a statute is invalid which allows commissioners to assess for benefits conferred but does not fix the amount to be raised, nor limit it to any definite sum.

Opinion by *Learned, P. J.*

ASSESSORS. WRONGFUL ENTRY IN ROLL.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Youmans, applt., v. Simmons, respt.

Decided May, 1876.

An action will not lie against an assessor for a wrongful entry on the rolls of the value of property.

Action against an assessor to recover damages for an unlawful assessment.

The complaint was dismissed on the trial. It was admitted on the argument that the action of the assessors in determining the value of property is judicial, and further, that for a judicial act, even when maliciously done, an action does not lie. The assessors had put the value at about one third of the real value.

*Youmans & Niles, for applt.**Gleason & Murray, for respt.*

Held, That the act of the assessors in entering upon the assessment roll the value of real and personal property, after they have determined the same, cannot be separated from the act of determination, and that therefore an action will not lie for a wrongful entry. The plaintiff claims the act of entry to be ministerial, but it is difficult to see what judicial act takes place until the final entry of value in the roll and its completion. Prior to that everything is incomplete, liable within certain restrictions to be modified. If the assessors knowingly and falsely determined the value at less than they knew it to be, still this was a judicial act, and one for which they are not liable. The court suggest without passing upon the point, that the doctrine of *Rosevelt v. Draper*, 23 N. Y. 318, may defeat the plaintiff; that the alleged wrongful act affected every taxpayer in the same manner, and

that the plaintiff has no individual interest distinct from every taxpayer.

Judgment affirmed with costs.

Opinion by *Learned, P. J.*; *Rockes* and *Boardman, JJ.*, concurring.PRACTICE. CHANGE OF VENUE.
APPEAL.N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Kellogg, applt., v. Smith, respt.

Decided April, 1876.

*Whether an order of special term changing place of trial for convenience of witnesses is appealable, quære.**Where papers under such an order are transmitted from one defendant to another the appeal must be taken in the latter.*

This is an appeal from an order made at the Otsego special term, changing the place of trial from Oneida to Otsego county, for the convenience of witnesses.

The order was made at a special term in Otsego, held March 30, 1875, and entered in Oneida county clerks' office, April 5th, and the papers transmitted to the clerk of Otsego, and filed and entered in the Otsego county clerk's office April 6th.

The notice of appeal is dated the 8th May, and is addressed to and was served upon both the clerks of Oneida and Otsego counties.

*H. Kellogg, for applt.**J. L. Duddelson, for respt.*

If the order in this case were appealable (which we are not prepared to admit. On the contrary, we think otherwise, and consider that it involves no substantial right), we think it can only be heard in the Third Department. After the papers were transmitted from the Oneida to the Otsego county clerk's of-

fice, the place of trial of the cause was changed to that county, and the appeal could only be made to and heard in the 3d department.

The notice of appeal in such case must be served upon the clerk having the custody of the papers in the cause. These papers, when the appeal was brought, were in the lawful custody of the clerk of Otsego county. If an appeal had been immediately brought from the order with a stay of proceedings, before the papers had been transmitted by the clerk of Oneida to the clerk of Otsego, then the appeal could properly have been brought to a hearing in this department.

But in the present state of the cause we think we should decline to hear the appeal, and leave the party at liberty to bring it on to a hearing in the 3d department if he should be so advised, otherwise we should dismiss the appeal.

Opinion by *E. D. Smith, J.; Mullin, P. J., and Noxon, J.*, concurring.

TRUST. POWER OF TRUSTEES.

N. Y. COURT OF APPEALS.

Roosevelt et. al. *appls.* and *respts.* v. Roosevelt et. al. *appls.* and *respts.*

Decided March 28, 1876.

A discretion vested in trustees to advance certain moneys if they deemed it proper, is only exercised when the money is actually paid, and until then they may refuse the advancement although they may have concluded at one time to pay it.

This action was brought for the construction of a will, the fifth clause of which gave the testator's personal estate not otherwise disposed of to his executors in trust to be divided in as many shares as he had children living

at his decease, or leaving issue, and to be held by his executors as trustees for them, the income to be applied to the use of said children during the life of each. The executors were authorized, if they deemed it judicious and proper, to make advances, in their discretion, to each of the children respectively out of the capital of his or her share, from time to time, in such amounts as might seem safe and conducive to the true interests of the beneficiary. The executors concluded that under the power conferred upon them an advance of \$100,000 to each of the children would be proper, but doubting their power to do so neglected to make the advances. Plaintiffs, who are the three surviving children of the testator claimed that, the executors having exercised their discretion in regard to the payment, they were entitled to have decreed to them, generally, the payment of said sum, and the Special Term so held.

Geo. G. De Witt & Charles A. Peabody, for *appls.*

Edward T. Bartlett & Geo. H. Yeaman, for *respts.*

Held, That the trust created was valid, but that it was the judgment of the executors which was to decide whether the advances should be made and until they gave effect to their judgment by paying over they could change their intent and withhold the advancement, and that the judge at Special Term erred in attempting to control that discretion.

Judgment of General Term affirming judgment of Special Term as to the validity of the trust, and reversing as far as it decreed that the executors should make plaintiffs the advances, affirmed.

Per curiam opinion.

NEW YORK WEEKLY DIGEST.

VOL. 2.] MONDAY JUNE 19, 1876. [No. 19.

PRACTICE. FINDINGS.

N. Y. COURT OF APPEALS.

Brett et. al. *respts.* v. First Universal Soc., of Bklyn. *applt.*

Decided March 28, 1876.

If upon a reference certain facts are not found, and no request made to find them, the appellate court cannot assume they existed, nor can it look into the evidence to ascertain whether facts were proved which if found would require the reversal of the judgment.

This action was brought by plaintiffs as assignees of one B. of a part of a claim against defendant, and one C., who held an assignment of the balance of the claim, which was for an alleged balance due B. as treasurer of defendant. It appeared that at a meeting of the church, at which B. was present, after he had ceased to be Treasurer, the pastor of the church stated that B. had authorized him to state that there was a large deficiency in the revenues, that his accounts not being made up he could not state the exact amount, but that if \$2,300 was raised he would accept it in full settlement of his accounts against the church; that \$2,345.80 was raised and paid to B. Defendant's counsel insisted that this transaction operated as an accord and satisfaction of his claim. B. denied that he agreed to except \$2,300, or that he stated that he would accept any sum less than the amount of his debt in full. The referee did not find that B. assented to the statement made by the pastor at the church meeting, or that he heard it, or that the church or its members accepted or acted upon the proposition there

made, or that any money was subscribed, paid or received in pursuance of it. He did find that B. did not agree to accept \$2,300 in full of his claim, and that he did not accept that sum in satisfaction thereof.

A. J. Parker, for *respts.*

Jesse C. Smith, for *applt.*

Held, That as the essential facts upon which defendant relied to establish an accord and satisfaction were not found, and as there was no request to find them, the court cannot assume that they existed, neither can it look into the evidence to ascertain whether facts were proved which if found would require a reversal of the judgment.

Plaintiffs offered evidence of items omitted by mistake from the account of B. as rendered, this was received under objection

Held, no error.

Judgment of the General Term, affirming judgment for plaintiff on report of referee, affirmed.

Per curiam opinion.

DEMURRER.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Mary N. Townsend, *applt.*, v. Peter S. Norris, *respt.*

Decided March 31, 1876.

An allegation in the answer that the right of action is in a receiver named, and not in plaintiff, is a proper defence, and not demurrable. Under this defendant may prove appointment of receiver, and all facts necessary to establish his title.

General averments of time refer to the commencement of the action.

Appeal from judgment entered on demurrer.

This action was brought to recover \$168.00 for the use and occupation of certain lands, which defendant promised to pay one Carey, and which Carey afterwards assigned to plaintiff.

Defendant, in the third part of his answer alleged "that by virtue of a judgment or decree of the Court of Common Pleas, for the City and County of New York, dated December 12, 1867, in the action of Mary Carey v. Thomas W. Carey, John A. Foster was appointed Receiver of all the estate, both real and personal, of Thomas Carey, and the said Receiver duly filed his bond and entered upon the duties of his office, and was alone invested with any right or title to the cause of action set forth in the complaint."

To this part of the answer plaintiff demurred. The court at special term overruled the demurrer and gave judgment for the defendant, on the ground that "the defendant has set up the right of the Receiver as a matter of fact, not of law, and the answer, while it may be general, is not demurrable."

John Townsend, for applt.

Peter S. Norris, for respnt.

On appeal

Held, That the answer, though general, was substantially an averment that the right of action, at the time of the commencement of this action, was vested in and belonged to the Receiver therein named, who had been duly appointed. The phrase, "Was alone invested with any right or title to the cause of action set forth in the complaint," must be construed to refer to the time of the commencement of this action, which is the time to which all similar averments, whether in form in the past or present tense, are held to refer. Under this answer defendant

might prove the receivership of Foster, and his title to the cause of action set out in the complaint, and any fact requisite in law to establish the title of the Receiver.

A motion to make the answer more specific, if that were desirable, was plaintiff's proper remedy, not a demurrer.

Judgment affirmed.

Opinion by *Davis, P.J.*; *Brady* and *Daniels, JJ.*, concurring.

TOWN BONDS. ILLEGAL ISSUE. N. Y. SUPREME COURT. GEN'L TERM. THIRD DEPARTMENT.

Holton v. Town of Thompson.

Decided May, 1876.

Chap. 809 of laws of 1871 is constitutional. The legislature has power to pass an act ratifying bonds illegally issued.

Appeal from a judgment entered on a referee's report. The action was brought on coupons of a bond issued by the defendant under laws of 1868, chap. 553, and laws of 1869, chap. 96. The defense was, that the consents given to the bonding of the town did not state the name of the company in whose stock the proceeds were to be invested, and that the bonds were not sold for cash, but were exchanged directly with the railroad company, in whose interest the action of bonding the town was taken, for stock.

J. J. Linson, for applt.

T. F. Bush, for respnt.

Held, (following *Rogers v. Smith*, 12 N. Y. S. C. R. 475,) That chap. 809 of Laws of 1871 is constitutional. This act ratifies the acts of the Commissioners in issuing the bonds, and in exchanging them for stock, and provides

that the defect in the consents shall not avoid them in the hands of a *bona fide* holder. In this case the plaintiff was such a holder. The case of *Buffalo v. Jamestown R. R. Co.*, 12 N. Y., S. C. R. 485, is not an authority against holding this ratifying act valid.

Judgment affirmed with costs.

Opinion by *Learned, P. J.*; *Bockes and Boardman, J. J.* concurring.

ORDER OF ARREST.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Alexander T. Stewart, et al., *appls.*
v. Moses Strasburger, resp.

Decided May 26, 1876.

When circumstances are so decided as satisfactorily to establish the conclusion that an intent to defraud existed when a purchase of goods was made, they will be sufficient to sustain an order of arrest, although no oral representations were made at the time of the purchase which were false.

Appeal from order vacating order of arrest.

This action was brought to recover the sum of \$2,304.23, which was the purchase price of drygoods sold and delivered by plaintiffs on defendant's credit in the months of November and December, 1875.

From the affidavits used on the motion, the following facts appear:

That the goods were purchased by the defendant's wife for family use, and were delivered at the defendant's residence in New York city. That at and before the times of the purchases, defendant was insolvent, and in failing circumstances, and on the 14th of December, 1875, made a general assignment for the benefit of his creditors, and closed up the business formerly

carried on by him as a dealer in jewelry and watches.

It was stated in one of the affidavits produced on the hearing of the motion, that the defendant had purchased of the firm of Arnold, Constable & Co., during the same fall over \$2500 worth of drygoods, and about \$1000 worth of carpets which had not been paid for.

When the goods were purchased at the plaintiffs' store representations were made concerning defendant's circumstances, but as his wife had previously purchased goods there in the defendant's name, which were afterwards paid for by him, no suspicion as to his circumstances or credit seems to have existed on the part of the plaintiffs.

No term of credit was agreed upon, but the bill was not presented until the latter part of December following the purchase, and then the defendant failed to pay it.

That the defendant knew of the receipt of the goods at his residence was not denied either by himself or his wife; and when he was asked to pay the bill, he in no way indicated any disposition to pay for or give up the goods.

Plaintiffs insisted that the goods were purchased and procured from them fraudulently, and that the fraud was perpetrated by intentionally concealing from them the condition of defendant's circumstances, and upon that theory the order of arrest was made.

Defendant's wife, in her affidavit, denied any knowledge of her husband's circumstances.

Henry H. Rice for applt.

M. L. Townsend for resp.

On appeal.

Held, That whether the debt was fraudulently contracted or not must be determined from the circumstances af-

fecting the transaction, as well as from the statements contained in the affidavits.

The following circumstances, namely, that the goods were not needed for family use when they were bought; that the reason assigned for the purchases being evidently untrue; the early failure of the defendant; the fact that the defendant had in no way indicated any disposition to give up the goods when their price was demanded, as well as other circumstances in the case, justify the conclusion that the purchases were made in the expectation of an early failure which would prevent the plaintiffs from obtaining payment.

That proof of fraud, which always endeavors to guard itself from discovery by concealment, is peculiarly dependent upon the force of circumstances for its support, and when they are so decided as satisfactorily to establish the conclusion that an intent to defraud existed, it is not to be rejected because of the positive denial of it by the parties concerned in the commission of the wrong.

The wife of the defendant, in contracting the debt, acted as his agent.

The goods were received at his residence for the use of his family; he had the benefit of them, and became liable to the plaintiffs for the payment of their purchase price.

The debt was fraudulently incurred, and defendant was lawfully held to bail by the order made.

21 N. Y., 238; *Id.*, 239, 240; 25 N. Y., 595, 599, 602; 40 N. Y., 454; 50 Barb., 349, 386-7.

The order appealed from should be reversed.

Opinion by *Davis, P. J.*; *Daniels J.* concurring.

BILLS AND NOTES. PAYMENT.

N. Y. COURT OF APPEALS.

The National Bank of Newburgh,
respt. v. Smith, applt.
Decided May 25, 1876.

A general deposit of money in a bank will not operate as payment of a note held by the bank, and which has been protested, without specific instructions that it be so applied.

This action was brought against defendant as the endorser of a promissory note for \$500, payable at plaintiff's bank. It appeared that when the note fell due, G., the maker, had no funds in the bank, except a balance of \$10 43, and the note was duly protested. About two weeks afterwards G. made a general deposit of a check for \$500 without any specific directions as to the application or appropriation of it. Two days after the deposit another note of \$500 made by G., payable at plaintiff's bank, fell due and was paid upon presentment by plaintiff. Defendant claimed that the note in suit was paid by the deposit of the \$500.

Samuel Hand, for *respt.*

Cassedy & Brown, for *applt.*

Held, That the general deposit made by the maker of the note in suit after it had been protested, without regard to the note, did not of itself operate as a payment; that as there was no agreement that the deposit was to be appropriated for such a purpose, the act itself indicated that there was no intention on the part of the depositor or plaintiff to apply it upon the note. The subsequent disposition of the money, without objection, confirms the inference that there was no design thus to appropriate it. In the absence of any express directions or an agreement to that effect it was optional with the bank, whether

it should apply the money or not upon the note in suit, and it was under no positive legal obligation to do so. 34 Barb. 298; 2 Comst. 352; 6 Wend. 611.

Judgment of General Term, affirming judgment in favor of plaintiff, affirmed.

Per curiam opinion.

EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM FIRST DEPARTMENT.

Edward C. Genet, *respt.* v. The Mayor, &c., of the City of New York, *applt.*

Decided May 26, 1876.

When upon the trial at circuit a circumstance or fact appears inconsistent with the defence, evidence explanatory of such fact is proper.

Where there is a plain conflict of evidence upon one of the issues raised by the pleadings, it is error to take the question from the jury.

Appeal from judgment recovered on the verdict of a jury directed by the court, and from order denying motion for a new trial upon the minutes.

Action brought to recover for services performed by plaintiff as an officer of the Court of Common Pleas from the 1st of January to the 1st of June, 1872, inclusive, at the rate of \$100 per month.

Defence set up plaintiff was never legally appointed such officer, his appointment having been made by the Comptroller of the city of New York, and a general denial that the services sued for were ever rendered.

On the trial plaintiff proved his appointment on the first day of October, 1870, by Comptroller Connolly, and that he rendered services from that time up to June 1st, 1872. That he

was paid at the rate of \$1200 per annum for his services up to January 1st, 1872, but that nothing was paid from January 1st, 1872 to June 1st, 1872, although plaintiff had rendered services during the latter period.

That in the course of his duties plaintiff was accustomed to go of errands for the judges.

The evidence introduced by the defence showed that there was a contest in the fall of 1871, between the Comptroller and the Judges of the Common Pleas as to the appointments of the officers of the court; that a letter was written by the Comptroller to the Judges requesting information as to the number of officers required for that court, in reply to which letter a letter dated October 17th 1871, was addressed to the Comptroller by the Chief Justice of the Court of Common Pleas, stating that twenty persons would be sufficient, and stating the names of twenty persons who had been designated as such officers. Plaintiff's name was not among them.

That after the above letter no person was recognized as an officer of the court except those included in the list designated by said letter.

A pay-roll of the attendants of the Court of Common Pleas for the months of October, November, and December, 1871, was offered in evidence upon which the plaintiff's name appeared.

The Clerk of the Court of Common Pleas, as a witness for the defence, was asked the question: "Do you know how that man's (plaintiff's) name came to be on the pay-roll after October 17th, 1872?"

The question was objected to, and question excluded.

Defendant's counsel offered in evi-

dence pay-rolls for the months of January, February, March and April, 1872, certified by the Clerk, upon which plaintiff's name did not appear.

At the close of the case the justice presiding directed a verdict for the plaintiff.

D. M. Cotton for resp't.

C. P. Miller for appl't.

Held, That it was proper for the defendants to show by the Clerk, if he knew, how plaintiff's name came to be upon the pay-roll after it had been dropped from the list of attendants upon the court. It might have appeared that it resulted from some mistake or misapprehension as to the facts. And that would have tended to remove the inconsistency in which the defendant and the witness both appeared, to some extent, to be involved. The evidence should have been received.

Held further, That from the evidence there was a conflict of testimony as to whether the plaintiff continued in any manner to be regarded as an attendant upon the court after the 1st of January, 1872. The facts that he was not retained among those designated by the judges; that he was not recognized or regarded as an attendant by the Clerk, and that his salary was not paid after the 1st of January, 1872, very directly tend to establish the defence which was made in the case. They tended to show that he was not in fact employed, and that he must have understood that to be the case. There was sufficient certainty upon the subject to entitle the defendant to have the case submitted to the jury.

For that reason and because of the exclusion of the evidence proposed to be given by the clerk explanatory of the retention of the plaintiff's name

upon the pay-roll, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady, J.*, concurring.

PARTNERSHIP.

ORPHANS' COURT OF PHILADELPHIA.

Estate of Nathaniel P. Gordon, deceased.

Decided May 27, 1876.

A partner to whom the partnership is indebted can have no satisfaction except out of what remains after the partnership debts are paid.

The decedent was the surviving member of the firm of which he had been a copartner. His copartner in his lifetime deposited certain of his individual securities and private property with a creditor of the firm; as collateral security for a partnership debt. The debt remained unpaid at his death, and also at the death of the surviving partner, the present decedent, which occurred some time after. Letters of administration were taken out upon the estate of each partner. The settlement of the affairs of the firm having devolved upon the administrator of the survivor, in the fulfilment of his duty, he entered into an agreement and contract with certain creditors of the firm, and the administrator, widow, and creditors of the other deceased partner, whereby the accountant was authorized and empowered to sell at private sale, certain real and personal estate of the firm, to the creditor whose debt had been secured by the deposit of collateral securities, as stated, and with the proceeds first pay certain other firm creditors, and apply the balance to the liquidation of the claim of the secured creditor.

It was further agreed that accountant should receive from the secured creditor, all the property, whether of individual or firm assets, deposited as collateral security, and "use and apply the proceeds of the former, so far as may be requisite, for and to the payment of any balance which shall remain due to the Philadelphia and Reading Coal and Iron Company by the firm of Repplier, Gordon & Co., after the appropriation of the proceeds of the collieries to the liquidation thereof, as aforesaid, the respective rights of the firm estate, and of the separate estates, in and to the proceeds of the said collaterals which shall be so used, and the respective rights of each of said estates arising from the said use of those which shall be used, not to be in any manner affected or prejudiced hereby, but to remain for future adjustment or determination." This agreement was carried out, the conveyance made, and to discharge the balance of the debt due the secured creditor, not only firm collaterals, but a portion of the individual securities, deposited in the manner stated, were assigned, and the balance returned to the administrator of the deceased partner, as his separate estate.

There were, however, creditors of the firm, who were not parties to and never sanctioned or ratified this agreement and settlement.

Upon the audit of the account of the administrator of the surviving partner, they claimed to be awarded their respective claims against the firm, and the administrator of the deceased partner, whose separate property had been applied by accountant, in pursuance of the agreement mentioned, to the payment of the firm in-

debtedness, claimed to be entitled to the entire balance in preference to the firm creditors. The fund was awarded to the administrator.

Hanna, J.—It is a general rule of law, both in England and in this country, that partnership assets must first be applied to the payment of partnership debts. Parsons on Partnership, 346; Bispham's Eq., 461; 8 Wright, 503; 9 Wright, 484.

The partner paying a debt cannot be substituted to the rights of the creditor against his copartner; he must first account for the profits of the business in which they were jointly engaged. If there is anything due him, account rendered is his remedy at law, and to that action, or to a bill in equity for an account he ought to be remitted. *Baily v. Brownfield*, 8 Harris, 46.

An advance to the firm, as against creditors, is to be treated as an addition to the capital, and does not *ipso facto* constitute the partner a creditor of the firm. A partner to whom the partnership is indebted can have no satisfaction but out of what remains after all the joint debts are paid.

The pledge by the deceased partner in his lifetime of his *individual* property, was a loan or advance to the firm. It would be contrary to equity to hold him to be a creditor of the firm and entitled to a preference in the distribution of the firm assets, should his collaterals be used to pay his debts; or to hold in case of insolvency that he was entitled to share *pro rata* with the rest of the creditors.

Neither can the administrator claim to be a creditor of the firm to the prejudice of the other creditors, as he stands in the same position as the decedent whom he represents.

The exceptants were not parties to settlement made by the accountant with a creditor who was thereby given a preference, and their rights cannot be affected or diminished thereby.

Being of opinion that the claims of the creditors are entitled to payment, and that the balance should be retained by the accountant to await a settlement between the partners, the exceptions are sustained.

SLANDER.

U. S. SUPREME COURT.

Marie A. N. Pollard, *pltf. in error*,
v. Jacob Lyon, *def. in error*. (October, 1875).

Words spoken, imputing unchastity to a female, are not actionable without special damage.

The special damage should be alleged and proved specifically. (See, however, Laws of N. Y., 1871, c. 219.)

This was an action on the case for slander, brought by plaintiff to recover damages for the injury to her name and fame.

The declaration was as follows:

"That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, spoke and published of the plaintiff the words following: 'I saw her in bed with Captain Denty.' That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following: 'I looked over the transom light and saw Mrs. Pollard,' meaning the plaintiff, 'in bed with Captain Denty,' whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars."

The defendant pleaded the general issue, and on the trial, the jury, under

the direction of the court, gave a verdict for the plaintiff for the whole amount claimed.

The defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover. The court ordered the motion to be heard at the general term in the first instance.

The general term sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out this writ of error.

Clifford, J.—Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage; as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense, to a person in office, or to a person engaged as a livelihood in a profession or trade, but in all other cases the party who brings an action for words spoken must show the damage he or she has suffered by the false speaking of the other party.

Unless the words alleged impute the offence of adultery, it can hardly be contended that they impute any criminal offence for which the party may be indicted and punished in this district (District of Columbia), and the court is of opinion that the words do not impute such an offence, for the reason that the declaration does not allege that either plaintiff or defendant were married at the time the words were spoken. Our conclusion is that plain-

tiff fails to show that the words alleged impute any criminal offence to plaintiff for which she can be indicted and punished.

Still the plaintiff contends that even if the words alleged do not impute any criminal offence to her, they are nevertheless actionable, *per se*, because the misconduct they do impute is derogatory to her character and highly injurious to her social standing.

Unwritten words are held by all the modern authorities not actionable in themselves, even if they impute immoral conduct to the party, unless the misconduct imputed amounts to a criminal offence for which the party may be indicted and punished.

Judge Spencer, in *Van Ness v. Hamilton*, 19 Johns. 367, says that in respect to words spoken, the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself, and indictable as such, and subjecting the party to an infamous punishment, or they must impute some indictable offence involving moral turpitude.

Defamatory words, to be actionable, *per se*, must impute a crime involving moral turpitude. It is not enough that they impute immorality or moral dereliction *merely*, but the offence charged must be also indictable.

Verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage. (2 Bl. Com. 125 n. 6; *Janson v. Stuart*, 1 Term, 784.)

It is clear that the proposition of the plaintiff that the words alleged are in themselves actionable, cannot be sustained.

In the state of New York, however, words imputing unchastity to a female are now actionable *per se*. (See laws of 1871, ch. 219.)

Still the plaintiff suggests that the averment that she "has been damaged and injured in her name and fame" is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage.

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act, and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form and the allegation is sustained by sufficient evidence; but the claim must be specifically set forth in order that the defendant may be duly notified of its nature, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the alleged defamatory words.

The special damage must be alleged in the declaration and proved, and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame."

It is clear that the decision of the court below, that the declaration is bad in substance, is correct.

Judgment affirmed.

PROMISSORY NOTE. ENDORSERS.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Meeker, applt., v. Gaylord et al., respts.

Decided April, 1876.

Accommodation endorsers are not estopped from interposing defence of usury, although the maker has executed a writing which estops him.

Referee's findings on questions of fact are conclusive.

Appeal from a judgment in favor of two defendants.

This action was on a promissory note. Two of the defendants were accommodation endorsers; one, C., was the maker. C. had transferred note to plaintiff and at a greater discount than seven per cent., and had by a writing estopped himself from interposing defense of usury. The two endorsers interposed the defence of usury, and the referee on all the facts gave judgment for the two endorsers, on the ground of usury.

James R. Cox, for applt.

Wood & Rathbone, for respts:

Held, That the endorsers are in no way affected by the agreement which estops the maker of the note from interposing the defence of usury, and their defence is the same as if they had been sued alone.

That where the evidence is sufficient to warrant a verdict when standing alone, the appellate court is not at liberty to overturn the verdict, for the reason that there was counter testimony, even if it be apparently equal in point of weight. The rule in relation to the decision of a referee is the same as the verdict of a jury, and in case of conflicting evidence is conclusive as to a question of fact.

Judgment affirmed.

TRUST DEED. TITLE. POSSESSION.

N. Y. SUPREME COURT. GENERAL TERM,
FOURTH DEPARTMENT.

Hill, respt. v. Heermans, applt.

Decided January, 1876.

Where a party is in actual possession of property which he holds under a deed of trust it is necessary to show fraud or mistake to impeach his title.

This action was brought to recover the possession of two bonds of \$500 each.

In March, 1871, one R. was the owner of the two bonds in suit, and sold and delivered them to plaintiff in consideration of which plaintiff undertook to pay, take up, and deliver to R. his, (R's) note which had been given by him to one F.

The said note was afterwards taken up and delivered by plaintiff to R. Plaintiff at this time was agent for F. and indebted to him.

After plaintiff got the bonds he put them in a drawer in a safe where he kept his private papers, and in May, 1871, went to Europe, leaving them there.

The defendant claims title under an instrument in writing from F. in the nature of a deed of trust, dated in October, 1868.

On his return from Europe plaintiff endeavored to get possession of these bonds but could not find them.

When the bonds were delivered to plaintiff he claims they were endorsed in blank. On the trial these blanks were filled in with the name of F.

F., at the time of the trial, was dead.

The court ordered a verdict for the defendant.

Brown & Hadden for defendant.

Geo. B. Bradley for plaintiff.

Held, Upon the bonds in controversy in this action the title thereto was in Joseph Fellows, and passed by the deed in trust from him to the defendant.

The bonds are payable to the order of the Treasurer of the Utica Horse-

heads and Elmira R. R. Company, dated August 1, 1870, and indorsed as follows:

"Utica Horseheads and Elmira R. R. Company pay to the order of Joseph Fellows the within bond and the coupons attached, as they severally become due.

"Horseheads, August 1, 1870.

(Signed) D. D. REYNOLDS,
Treasurer Utica, Horseheads
and Elmira Railroad Company."

These bonds were found by the defendant, after the execution to him of the trust deeds aforesaid, among the papers in the safe of Joseph Fellows, and came into his possession as trustee of said Fellows.

To impeach the defendant's apparent title to these bonds it was necessary, we think, to establish that the name of Fellows was inserted in the indorsement on the back of the bond by mistake or fraud.

The fact that the nominal sales and delivery were by Redborne, the original owner, to Hill, was equal and of small consequence on the question of title. Hill was at the time the agent of Fellows, acting within the scope of his duties as his agent. The consideration for such sale was to be the delivery to Redborne of his notes to Fellows, then held and owned by Fellows.

Apparently the consideration for the sale of said bonds was thus, in fact, paid by Fellows, and his possession of them was consistent with that fact, while the possession of the notes of Hill were equally consistent with the fact of their ownership by Fellows as by him.

Besides, Fellows was a man of large wealth, and might purchase, and own such bonds, and the notes were given for property sold by him; while Hill

was shown to be a bankrupt and in bankruptcy a short time previously to this transaction.

The case was not so clearly with the plaintiff, we think, as to render it proper to direct a verdict in his favor.

There should be a new trial with costs to abide the event.

New trial granted.

Opinion by *E. Darwin Smith, J.*

ALIMONY. PROMISSORY NOTE.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Manning, *respt.* v. Sweeting, *applt.*,
Decided April, 1876.

Where a party, as security for another, has deposited certain bonds in bank, and has given his note for an amount represented by some of those bonds, and by the order of the court some of those bonds are sold; in an action on the note by party for whose benefit the deposit was made, the amount of the bonds sold may be offset against the note.

Appeal from a judgment upon report of referee.

Plaintiff is the brother of defendant's wife. In 1871, plaintiff was married and was living in Brooklyn. Plaintiff's wife sued him in the Brooklyn City Court for a limited divorce and alimony on the ground of cruel and inhuman treatment.

In that action a decree was entered granting the relief prayed for and \$900 per week alimony.

On December 13, 1871, defendant, at the request of plaintiff, executed his bond or undertaking, conditioned that the defendant in that suit should pay alimony.

Plaintiff (then defendant) was restrained by injunction from selling his drug store, and, to relieve him from

this injunction, defendant in this action deposited, under an order of the court, \$5,000 in bonds.

After this the alimony was increased.

Plaintiff sold his drug store for about \$5,000, and gave the avails to the defendant on the agreement that defendant should retain it as indemnity until his bonds were returned, and until he was released from all liability on his undertaking for payment of alimony.

After this plaintiff applied to defendant for a return of some part of this \$5,000, and defendant thereupon gave to defendant \$1,000 in money, and \$1,000 in a note.

After this, by an order of the Brooklyn City Court, three of the bonds deposited by defendant under the order of the court, were sold for non-payment of alimony and expenses.

This action is on the note given as part of the \$5,000 paid back to plaintiff by defendant.

Chas S. Baker, for applt.

Martindale & Oliver, for resp't.

Held, That it was the clear intent of the agreement between the parties when the portion of the \$5,000 was retained, that the balance should be held as security for liability on bond for alimony, and that some of the bonds deposited by defendant under an order of the court having been sold, exceeding in amount the note of defendant, the defendant may interpose such sale of his bonds as an offset to the note in suit.

The sale of defendant's bonds was for plaintiff's benefit and as payment of the alimony.

Judgment reversed, and new trial granted.

Opinion by *E. D. Smith, J.*

FIRE INSURANCE. NOTICE OF LOSS. PAYMENT.

SUPREME COURT OF PENNSYLVANIA.

Lycoming Mutual Fire Insurance Company *plff in error*, v. Bedford, *def't. in error*.

Decided March 17, 1876.

Where a policy in its terms requires that in case of loss notice of loss shall be given forthwith, a notice given twenty-three days after the loss is in time.

A negotiable note given for assessment on a premium note is payment of the same, so intended by the parties at the time, and the agent in taking it binds the Company by his act

This was an action of debt on a policy of fire insurance by defendant in error against the Lycoming Fire Insurance Company.

The narr. was in the usual form; the pleas were *nil debet*, payment with leave, &c.

The policy by its terms required that in case of loss or damage the proofs should be sent forthwith to the Secretary of the company.

It also provided that when an assessment upon the premium notes shall remain unpaid for thirty days after demand is made therefor, the policy of insurance shall be null and void until the assessment is paid.

In October, 1868, defendant in error, plaintiff below, effected this insurance to run for five years, and gave his premium note therefor. In May and October, 1871, respectively the assessments were levied upon which the question in the case arises. These amounted to \$73, and remained unpaid until January, 1872, when defendant in error gave his note for that amount payable in 15 days to the agents of the company, and received from them the receipts for said assessments.

This note was not paid when due, but he told the agent that one G., who owed him money, would take up the note. The agent said he would see G. and defendant in error hearing nothing more of the matter, supposed the note had been paid by G.

Subsequently he sent his policy to the agent requesting that it be cancelled, but received no reply until June 1, 1872, when he received notice of another assessment. This assessment was not paid.

The premises insured were destroyed by fire June 15, 1872. At this time the agents had in their possession the promissory note given in January, and the company had possession of the premium note and the policy, which had been marked cancelled upon its receipt by them. Defendant in error informed the agents of the loss on the following day, and on July 8, mailed a written notice of loss to the Secretary, and forwarded proofs of loss on the 12th of July.

Upon the trial below the Court, (Handley, J.) charged the jury as follows:

1. That there was sufficient evidence to go to the jury upon the question of notice of the fire.

2. That plaintiff's policy was in force until his proposition to give up his premium note and bank note and papers, and cancel the same, were accepted by the company, and notice thereof given to him.

3. That the negotiable note given for assessments was payment of the same, if so intended and treated by the parties at the time, and that the jury might find from the evidence if said note was received as a payment.

4. That if the jury found that the premises were burned at the time al-

leged, that he gave due notice thereof to the company, that his assessments had been paid either by cash or notes, that his proposition to surrender the policy had not been accepted by the company and the same cancelled; that then he was entitled to recover the sum of \$1,000 with interest from a date three months after proof of loss.

He refused to charge that the plaintiff below must prove payment of the note.

He refused to charge that plaintiff below having failed to pay his note, did not pay the assessments for which it was given, unless the jury found that the company did not accept the note in payment of the assessments.

He also refused to charge that after surrender of the policy it was dead until revived by payment of the unpaid note, unless the jury found from all the evidence that the company accepted the proposition of plaintiff below to surrender his policy.

He also refused to charge that the plaintiff below did not give notice forthwith of the fire, but 23 days after, and that twenty-three days are too late; but said that there was evidence that the notice of loss was given within the meaning of the law.

The jury gave a verdict for plaintiff for the full amount claimed, and judgment was rendered thereon, to which defendant below took this writ of error, assigning for error the above mentioned charge and refusals to charge.

Held, There was evidence before the jury on all these points, which was submitted with proper instructions.

Judgment affirmed.

Per curiam opinion.

EQUITABLE ACTION. REAL PROPERTY.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Whittemore v. Farrington.

Decided May, 1876.

Where the title to real property fails, a purchaser without covenants, no fraud or deceit being alleged, has no remedy in equity to recover the price. Where possession has passed and continued without eviction, there is no case for relief.

The plaintiff agreed orally with the defendant to give two pieces of land and \$300 in money, for a saw mill property.

The plaintiff gave him warranty deeds, while he gave plaintiff a quitclaim deed. There was a prior recorded mortgage, of which both were ignorant, on the saw mill property. The plaintiff had made improvements thereon and had leased it.

Action by plaintiff that the transaction be set aside as a fraud and surprise, or that the defendant discharge the mortgage. The court below adjudged that the defendant might recover by warranty deeds the two pieces of land, and if he should, then that the plaintiff quitclaim the saw mill property, and then that there be a reference to ascertain how much the defendant should pay the plaintiff for improvements. If defendant did not reconvey, that the plaintiff have judgment for the difference between the amount due on the mortgage and the \$300 due and unpaid on the agreement.

Hart & McGuire, for applt.

M. M. Mead, for applt.

Held, It is well settled that where the title to real estate fails, the purchaser has no remedy in equity, to recover

back the price unless there is fraud or deceit. If he has taken the precaution to require covenants as to his title, his remedy is at law. If there are no covenants and no fraud, he is concluded. Where possession has passed and continued without eviction under a paramount title there is no case for relief.

The plaintiff here is in undisturbed possession. The plaintiff asks to have the contract rescinded. This means to replace the parties as they were before the contract. The judgment of the court below does not do this. The plaintiff has recovered judgment for over \$500. And if the defendant rescinds, he, defendant, must still pay for the improvements which may be useless to him.

Judgment reversed, and new trial granted, costs to abide the event.

Opinion by *Learned, P. J.*STATUTE OF LIMITATIONS.
ACKNOWLEDGMENT.

ENGLISH HIGH COURT OF JUSTICE. EXCHEQUER DIVISION.

Quincey v. Sharpe and another.

Decided February 4, 1876.

In an action for work done, the plaintiff, in answer to a plea of the Statute of Limitations, put in evidence the two following letters, written within six years of the commencement of the action by the defendants' testator, the person for whom the work was done, to the plaintiff: "I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week."

Held, That they amounted to a promise

to pay the balance due on the account, and took the case out of the statute.

This was an action for work done during his lifetime for John Sharpe, deceased, the testator of the defendants, who paid the money into court as to a part of the claim, and as to the residue pleaded the Statute of Limitations.

At the trial before Kelly, C. B., at the sittings in Middlesex in Hilary Term, 1875, a verdict was found for the plaintiff, with leave to the defendant to move to enter a non-suit on the ground that the Statute of Limitations barred the claim.

The plaintiff relied on the two following letters, written to him by the testator, as an acknowledgement of the debt which prevented the operation of the statute :

“ Jan. 13, 1872.

“ Mr Quincey,

“ *Sir*—I shall be obliged to you to send in your account, made up to Christmas last.

“ I shall have much work to be done this spring, but cannot give further orders until this be done.

“ I am, sir, your humble serv't,

“ J. SHARPE.”

“ Feb. 19th, 1872.

“ Mr. Quincey,

“ *Sir*—You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week, to oblige,

“ Sir, yours, &c.,

“ JNO. SHARPE.”

No account had, in fact, been sent in, in compliance with the request contained in these letters.

Held, Where there is a clear acknowledgement of a debt, a promise to pay must be inferred. Let us see what

is the acknowledgment here. The first letter requests that the plaintiff's account should be sent in made up to Christmas. That necessarily implies that work has been done, that it has been done up to Christmas, and that there is a subsisting account, and this, in my opinion, shews that there is an acknowledgment that something is due. We see no difference between an acknowledgment of a debt and one of an account. Then follows the second letter, again requesting the plaintiff to send in his account. What do these letters import but that orders have been given and executed which have not been paid for? If they do not mean this, we think they can have no meaning put on them, and we are therefore clearly of opinion that they take the case out of the statute.

Rule discharged.

Opinion by *Kelly C. B.*; *Cleasby* and *Huddleston, B. B.* concurring.

COMMISSIONERS OF HIGHWAYS. LIABILITY OF

N. Y. COURT OF APPEALS.

Gould, et al., *appls.*, v. Booth, et al.,
Commissioners of Highways, *respts.*

Decided April 25, 1876.

Commissioners of Highways are not liable for damage caused by an erroneous construction of an embankment in a highway, by means of which the lands of abutting owners are deprived of drainage.

Private actions will not lie against them for errors in the exercise of their discretion, or omissions to perform their duty.

This action was brought to recover damages alleged to have been sustained by plaintiffs by reason of an insufficient culvert in an embankment in a high-

way, to drain the water from low lands of plaintiffs abutting thereon. It appeared that the embankment was made and the culvert put in by defendants' predecessors, and it was claimed that it was not deep enough to carry off the surface water. Plaintiffs were nonsuited at the trial upon the ground that the public were not bound to provide a channel for the drainage of surface water.

George Miller, for applts.

Wm. Wickham, for respts.

Held, No error; that the action could not be maintained; that to hold Commissioners of Highways liable to abutting owners for consequential injury to their lands, would impose a more extensive liability upon them than was intended, and one that has no just legal foundation to rest on; that if, in grading a highway an abutting owner is incommoded by reason of the surface water being prevented from running off, as before, from his land, such inconvenience will be regarded as the natural consequence of the right to maintain the highway, and will be presumed to have been contemplated when the land was appropriated for that purpose, and it affords no ground of action. 29 N. Y., 466; 2 Vroom, 351; 10 Gray, 29.

Also held, That the location and manner of construction of culverts and sluices in highways, are much within the discretion of the Commissioners of Highways, and they should not be harassed by personal actions for injuries occasioned by inadvertence or error of judgment, or for a mere omission to perform an act, the performance of which, although proper and even necessary to prevent incidental injury, cannot be exacted as a legal right. Angell on Water Courses, § 108.

For errors in the exercise of their discretion, or omissions to perform their duties, private actions will not lie. *Waffle v. N. Y. C. R. R. Co.*, 58 Barb., 413; *Mason v. McChains*, 63 Id., 185, distinguished.

There is a distinction between an interference with a running stream, and the exercise of lawful dominion over one's own property, which consequently interferes with surface drainage. Angell on Water Courses § 108; 29 N. Y., 459.

Judgment of General Term, affirming judgment of non-suit, affirmed.

Opinion by *Church, Ch. J.*

PRINCIPAL AND AGENT.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Gillett, respt., v. Hall, applt.

Decided April, 1876.

The fact that an agent has authority to do a certain act, does not warrant an inference that he has general authority. Express authority should be shown.

This action was brought to recover upon a balance of an account for services rendered for defendant.

Defendant was a broker in Syracuse, and one B. was in his employ in his store.

B., at one time, ordered some work for defendant. Plaintiff did it, and defendant paid for it.

B. afterwards ordered some more work, which defendant refused to pay for, and this action is brought.

W. Sanders, for appellant.

Beach & Brown, for respondent.

Held, The defendant was the principal in carrying on the business of baking, and Blodgett was his agent simply and solely to sell his bread. He had

not the slightest power to bind the respondent by any contract, and clearly had no authority to contract the bill for which this action was brought, in the name or upon the credit of the defendant. The fact that the defendant allowed him to contract for the construction of a bread case to be used in said store, in the conduct of the business thereof, did not imply any authority on his part to contract for permanent erections and improvements on the demised premises in behalf of the defendant, and the judge should so have advised the jury upon the request of the defendant's attorney.

The portion of the charge objected to, as follows, "If, after the bread case was made, Mr. Hull said, 'All right, I will pay for it,' then Messrs. Dickinson & Gillett would have a good reason to think that Mr. Blodgett had a right to order work on Mr. Hull's credit," was erroneous. Such inference from a single transaction, relative to a matter which was connected with the business of the store, and which the proof shows was expressly authorized by Hull, did not warrant an inference that Blodgett had previously contracted generally for the defendant.

It was error also not to charge as requested, "that the labor performed by the plaintiff, not being in or pertaining to the business in which Blodgett was employed, express authority should be shown to charge the defendant." The same principle applies to several other of the requests of the defendant's counsel and rulings of the court.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed and new trial granted.

Opinion by *E. Darwin Smith, J.*

ESTOPPEL.

N. Y. COURT OF APPEALS.

Voorhees, et al., *appls.*, v. Olmstead, et al., *respts.*

Decided April 25, 1876.

Where a party authorizes his warehouseman to deliver a receipt for goods to one to whom he has sold them, he is estopped from claiming payment as a condition precedent to parting with the title, as against one who has advanced money to the vendee, relying on the receipt as showing title in such vendee.

This action was brought to recover possession of a quantity of cotton. It appeared that on May 2, 1868, the plaintiffs, V. & G., contracted to sell to one B. & Co., the cotton in suit, which was on store in a warehouse, and which was to be delivered and paid for in ten days. The delivery, which consisted of sorting and marking it with B. & Co.'s mark at the warehouse, commenced on May 8th. B. & Co. on that day contracted with the W. & S. Co. for a loan on the pledge of the cotton, giving the company an invoice and an order upon the warehouseman, which represented the cotton to be stored for B. & Co., and directed a receipt therefor to be delivered to the W. & S. Co. On the same day a check was given to B. by the W. & S. Co. for the amount of the loan. B. & Co. deposited it to their credit in a bank. The agent of the W. & S. Co. on the same day presented the order to the warehouseman, who stated that the cotton was being then delivered, and that a receipt would be ready the next day. The warehouseman notified V. & G. on the next day that B. & Co. had called for the receipt and V. & G. directed it to be given, but did not direct whether it should be negotiable or not. This was Saturday, and

the delivery was then completed. On the Monday following, V. and G. sent to B. & Co. for a check for the amount of the cotton, but did not get it. The next day B. & Co. suspended payment. On the 8th and 9th B & Co. had in the bank to their credit more than the amount of the loan on the cotton, which on the 11th was nearly drawn out.

William A. Beach, for applts.

Jos. H. Choate, for respts.

Held, That the W. & S. Co. acquired no title as against plaintiffs upon the occasion of the loan, as it did not part with its money upon any apparent ownership of the property by B. & Co., but only upon their representations and order; that at the time of the delivery of the receipt no money was advanced or value parted with, and therefore no title was then acquired; that it could only hold as pledgee on the ground that plaintiffs are estopped from claiming title by some act upon which it has relied, and thereby has been induced to vary its position. But that as plaintiffs voluntarily consented that the warehouseman should give the usual receipts investing B. & Co. with the possession, and the usual documentary evidence of title, they thereby must be deemed to have waived the payment as a condition precedent to the transfer of title, as the W. & S. Co., upon receiving the receipts, had a right to repose on it as evidence of B. & Co.'s title, and as, had they not obtained such receipts, might have resorted to some process for the recovery of their loan; B. & Co. not having failed till ample time had been given for so doing; that plaintiffs were estopped, and the W. & S. Co., are entitled to a lien for the amount of its loan. *Knight v. Wiffen*, L. R., 5 Q. B. 660.

Also held, That it was not necessary

for the pledgee of the property to show that a demand for the money loaned would certainly have led to its recovery. It was enough that its position was altered by relying on the evidence of title furnished to B. & Co. by the plaintiffs, and abstaining from action. 50 N. Y., 575; 55 Id., 456.

Judgment of General Term, affirming judgment on verdict for defendants affirmed.

Opinion by *Allen, J.*

SALE OF PATENT. CONSIDERATION.

N. Y. COURT OF APPEALS.

Marston, applt., v. Swett, et al., respts.

Decided May 25, 1876.

Where parties own a patent, believing it to be valid, although it may be void, and one, under an agreement, gives up to the other all rights under it, and the other enjoys all rights that he could have had if the patent had been valid, there is sufficient consideration to uphold the agreement. As to whether, under such circumstances, there is a failure of consideration which will defeat an action for the purchase price, quære.

This action was brought upon a contract to recover royalties for the manufacture of a patented article. The complaint set up a contract valid in form, but did not allege that it was in writing. The answer sets up the same contract, did not deny it, and contained no averment that it was void because not in writing, and then averred that the amount agreed to be paid the plaintiff was upon the "express condition" that plaintiff should execute and deliver to defendants an instrument in writing, wherein such exclusive right to such invention should be given and granted to the defendants, and that plaintiff had refused to deliver the said instrument.

Defendants claimed on the trial that the contract not being in writing, or to be performed within a year, was void under the statute of frauds.

James Lansing, for applt,
Esek Cowen, for respts.

Held, That it was not necessary for the complaint to allege that the contract was in writing; it will be presumed for the purposes of the complaint. That the averment of the answer that an independent instrument was to be executed was not inconsistent with the existence of a contract in writing, embracing all the terms of the contract, and if merely inconsistent, the contract alleged in the complaint not having been denied, the averment did not put in issue the making of a valid contract. Code, §§ 149, 168; 21 Barb., 190; 44 Id., 175.

As to whether the statute of frauds or the act of Congress requires such a contract to be in writing, *quære*.

The defendants also claimed that the contract was void for want of consideration, in that the patent was invalid. It had been established in an action in the U. S. Circuit Court, in which these defendants were plaintiffs, and plaintiff defendant, that the patent was void, because the patentee was not the first inventor of the improvement patented. That judgment was not set up in the answer, but the invalidity of the patent was alleged. The judgment was offered in evidence to prove the allegation, by defendants, and received.

Held, That assuming that the allegation was material, the evidence was properly received. 3 Den., 238; 14 N. Y., 329; 28 Id., 45. But that as plaintiff and defendants were tenants in common of the patent, all believing it to be valid, and as defendants desired

the exclusive right to use the invention, made the agreement with plaintiff, who gave up to them all rights under the patent, and there being no fraud, and defendants during the time mentioned in the complaint having enjoyed all they could have had if the patent had been valid; that there was abundant consideration to uphold the agreement, whether the patent was valid or invalid. 1 Cal., 45; 7 Barb., 590; 43 N. Y., 34; 1 N. R., 260; 88 E. C. L. R., 929; 7 H. & N., 499; 8 Cl. & F., 726; 10 H. of L. Cas., 293; 12 M. & W., 823; 38 E. L. & Eq., 48; Hindmarch on Patents, 245; 1 Gray, 114; 4 Hun, 279.

The invalidity of a patent is a defence to an action for the purchase price of the same, on the ground of a failure of the consideration. 13 Wend., 385; 19 Id., 411; 2 Bosw., 387; 13 N. H., 317; 2 W. & S., 270; 11 Ohio, 471; 8 Ind., 82; 7 Blackf., 138; but where one having a void patent which he can use and give others a right to use, surrenders this advantage to another, the latter, during the time he is permitted to use the patent unmolested, gets what he contracted for, and is bound to pay the agreed compensation. 1 N. R., 260; 88 Eng. C. L. R., 929; 7 H. & N., 499; 8 Cl. & F., 26; 10 H. of L. Cas., 293; 12 M. & W., 823; 38 E. L. & Eq., 48; 1 Gray, 114; 4 Hun., 279.

As to where one has sold in good faith a void patent, and the assignee has enjoyed the monopoly for the whole term without molestation or liability to account to any one, there is a failure of consideration which will defeat an action for the purchase price, *quære*.

Judgment of General Term, affirming judgment for defendant, reversed, and new trial granted.

Opinion by *Earl, J.*

DAMAGES. CORPORATIONS.

SUPREME COURT OF IOWA.

McKinley, *respt.* v. Chicago and Northwestern Railway Company, *applt.*

Decided December, 1875.

A corporation is liable only for the actual damages caused by the wilful acts of its agent, done in the course of his employment, unless it shall have authorized such acts or ratify them after they are done. The agent alone is liable for all exemplary damages arising out of such act.

What are exemplary damages.

This action was brought to recover damages for injury alleged to have been caused by beating and forcible resistance of plaintiff by a brakeman of defendant, when plaintiff was about to enter a passenger car of defendant's at Howard Junction, Wisconsin, on March 22, 1872.

The plaintiff, a citizen of Iowa, in March, 1872, purchased of defendant in Chicago a ticket from there to Beloit. A change of cars became necessary at Howard Junction. The plaintiff endeavored to enter the rear car of defendant's train upon which he was to continue his journey, and was refused permission by a brakeman of defendant, who was charged with that duty, on the ground that it was a car set apart for ladies and gentlemen accompanying them. The plaintiff insisted upon entering the car, and a struggle thereupon occurred between the brakeman and plaintiff, in the course of which the injuries complained of are alleged to have been received.

Defense, general issue.

The court, upon the trial, charged the jury as follows:

"There being no evidence in the case that the general officers of the defendant advised the wrongful act, or ratified

it after it was done, this is not a case where exemplary or punitive damages can be allowed. The principal cannot be punished by awarding exemplary damages against him for the willful, wrongful or malicious act of his agent or servant, unless the wrongful act was done by the direction of the principal or was afterwards ratified by him. The extent of the damages in such cases is what the law calls compensatory. Compensatory damages embrace the reasonable expenses incurred by plaintiff, if any, in curing or endeavoring to cure the injuries he received; also the damages suffered, if any, from the loss of time and inability to attend to business resulting from the injuries received, also the bodily pain and suffering, if any, resulting from the injuries received; *and for the outrage and indignity put upon him*; and if you find from the evidence that the plaintiff has not yet recovered from the injuries received, or if you find that the injuries are permanent, you should award such damages as you believe, from the testimony, it is fair to infer the plaintiff will suffer in the future.

"Taking *all* these elements into consideration, you will ascertain the amount of damages suffered by the plaintiff. He should be *fully compensated*."

The jury returned a verdict for plaintiff in the sum of twelve thousand dollars. A judgment was rendered thereon, from which defendant appealed.

Held, That in an action against a corporation for the wilful acts of its servant done in the course of his employment and in the discharge of his duty, the corporation is liable for only the actual damages to the injured party; that for all exemplary damages growing out of such wilful assault, the servant

alone is liable; that if the corporation through its principal officers shall authorize the servant to commit the wrongful acts in his own wilfulness, or shall approve or ratify his willful acts after they are done, then such corporation is liable for all the damages, both actual and exemplary, which the party injured may have suffered. 34 Cal., 594; 19 Mich., 305; 10 Wis., 395; 57 Penn. St., 339; 19 Ill. 353; 40 Id., 543; 19 Ohio, 110; 47 N. Y., 122.

Also held, That pain of body may, upon the authorities, be classed among actual damages; but pain of mind or mental suffering can, if at all, be classed as actual damages only when such mental pain or suffering grows out of or is inseparably connected with the actual injury received; that "outrage and indignity put upon" one arise necessarily from the willfulness, wantonness, gross negligence or oppressive manner in which the injury is inflicted, and belongs to that class of damages for which the servant alone is liable.

The judgment must be reversed for this error in the charge respecting the measure of damages.

Opinion by *Cole, J.*; *Beck, J.*, dissenting.

CONTRACTS. ASSESSMENTS.

N. Y. COURT OF APPEALS.

Lutes et al., respts. v. Briggs et al., appls.

Decided March 21, 1876.

Where the Commissioners of Public Works are authorized to contract for deepening a sewer, and after entering into a contract pursuant to such authority, for an open sewer, Held, that the Commissioners did not exceed their authority by entering into a subsequent contract with the same

party to construct a tunnel sewer instead of an open one without re-advertising for bids.

The Commissioners are not liable to parties who have paid the assessment for any surplus that may remain after the work is paid for; but the parties must look to the Common Council.

This action was brought to have certain proceedings of the Commissioners of Public Works of the City of Rochester, in relation to the construction of a sewer declared void, and to restrain the collection of an assessment therefor and the payment of moneys already collected. Plaintiffs are some of the owners of the real estate assessed, and brought this action in behalf of themselves and others similarly interested.

In January, 1874, a petition was filed with the Commissioners of Public Works asking for an outlet sewer in Platt and other streets. The sewer was defined, except it was to be 25 feet deep.

After hearing the parties an ordinance was passed which provided for "the deepening and enlarging of Platt street outlet sewer, from the east high bank in the rear of Jefferson Mills, leading to the west line of State street, by enlarging that portion under said mill, constructing a tunnel under the race, and deepening that portion of the sewer in Mill street and Platt street to the west line of State street."

An assessment was ordered for the estimated expense and was afterwards made and confirmed.

Proposals for the construction of the work were duly advertised for. One S. made a proposal in an alternate form, being "for sewer through Mill and Platt streets, per lineal foot \$20, or for tunnel under Mill and Pratt streets, per

lineal foot, \$25," and the contract was awarded to him "for \$13,680 for an open cut and tunnel sewer."

On April 24, 1874, some of the parties interested petitioned the Commissioners "to contract for a tunnel and not for an open cut," and on that day they passed a resolution that the vote awarding the contract for building an open sewer be reconsidered, and postponed further action.

On May 1, 1874, the Commissioner, without advertisement or ordinance, awarded the contract to S. under the alternative in his proposal for a tunnel under Mill and Platt streets, and a formal contract was executed. It was conceded that the proceedings were valid up to the time of the award of the original contract. The referee found that the final letting was contrary to the ordinance, and illegal and void, and ordered judgment restraining the payment out of the funds raised by the assessment for work done under that portion of the contract which provided for the construction of a tunnel under Mill and Platt streets.

C. Cochrane, for resp't.

James Brick Perkins, for applt.

Held, error; That the commissioners had ample authority under the ordinance to contract for the construction of the sewer, either by an open cut or by tunneling as might be deemed for the interest of the lot holders or the public; that the "deepening" of a sewer would of itself include any mode by which this could be accomplished; that the Commissioners were justified in changing the contract from an open cut to a tunnel within the strict meaning of the ordinance upon the petition of some of the parties interested, showing that a cutting down from the surface would

seriously affect an important business street, and the objections to such change and the increase of expense were questions for the consideration of the Commissioners.

The Commissioners did not exceed their authority in making the final contract, and having already advertised, were not required to do so again; the power was not entirely exhausted by the original award, and there was no legal obstacle to their making an arrangement contemplated by the proposal and the bids.

Also held, That as the charter, section 207, chap. 143, Laws of 1861 provides that if, upon the completion of an improvement, it appears that a greater amount was assessed and collected than was required, such amount must be apportioned by the Common Council and paid to the owners of the property on demand.

The remedy of plaintiffs was complete against the Common Council if any surplus remained, and was not against the Commissioners.

That it is no answer to say that the remedy might be doubtful if the money had been expended and exhausted and paid out, for any illegal expenditure of it would not be a defence in an action brought to compel the apportionment of such surplus.

Judgment of General Term, affirming judgment on report of referee, reversed, and new trial granted.

Opinion by *Miller, J.*

SUBROGATION.

N. Y. SUPREME COURT. GENERAL TERM.
SECOND DEPARTMENT.

Albert Cole, *resp't.* v. Robert Malcolm, impleaded, *applt.*

Decided February, 1876.

One who holds under a grantee of a fraudulent conveyance is not entitled, on paying the amount of a judgment, to be subrogated to the rights of the judgment creditor who has had such conveyance set aside.

One C., who was largely indebted at the time, made an assignment of certain lots of land owned by him to his wife without consideration, and for the purpose of defrauding his creditors. His wife afterwards died, childless and intestate, and the property descended to the defendant and her other heirs at law.

Subsequently to this the plaintiff obtained a judgment against said C., the execution upon which was returned unsatisfied. He thereupon brought this action against C. and the heirs at law of the wife to have the conveyance set aside as fraudulent and recovered judgment therein which was afterwards affirmed.

The lots were advertised for sale, and the defendant thereupon tendered the amount of the judgment to the respondent or his assignee, and demanded an assignment of the decree in this case, and also of the judgment in the former action. The assignee offered to assign the decree but not the judgment.

Upon this state of facts defendant made a motion that the assignee be compelled to assign to him the decree and the judgment in the former case, and that he, said defendant, be subrogated to the rights of the plaintiff.

This motion was denied, and defendant appealed from the order of denial.

Hamilton Odell, for resp.

John R. Pos Passos, for applt.

Held, That the conveyance to the wife was fraudulent as against creditors, and that she took the title subject to the right of the creditors to have their

claims paid out of the property so conveyed; that any one taking under her must take the same rights she had, and no more; that the appellant made the payment voluntarily.

That appellant is entitled to redeem the property, but it cannot be tolerated that C. should make good the failure of the gift to his wife out of subsequently acquired property.

Order affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P. J.* concurring.

SUBROGATION.

N. Y. SUPREME COURT. GEN'L TERM
THIRD DEPARTMENT.

Bloomington v. Barnard.

Decided May, 1876.

One who, after foreclosure, purchases of the mortgagor a term of years, and agrees to pay incumbrances thereon, so far as may be necessary to protect his title, does not stand in the position of a surety, and is not entitled to be subrogated.

This action was brought to enforce an assignment of certain claims, notes, and judgments held by defendant upon payment to him of the amount due on certain judgments of foreclosure. This is an appeal from an order restraining a sale by defendant under two judgments in foreclosure, upon premises called No. 1 and No. 2 respectively, which had been assigned to him, and to both of which actions the plaintiff was a party. Subsequently to the giving of the above mortgages, the mortgagor, R., gave a mortgage to the defendant on parcel No. 1 and other property. The property is insufficient to pay this debt. The plaintiff is a party to a foreclosure now proceeding upon that mortgage.

R. subsequently mortgaged Nos. 1

and 2 to plaintiff. After the two judgments of foreclosure, plaintiff agreed with R. and others to pay the incumbrances on No. 1 and No. 2, so far as might be necessary to protect the title, he to have the use of the real estate for a term of years, and to apply the profits to the liquidation of his claims. The plaintiff tendered the defendant the amount due on the judgments and costs, and demanded an assignment thereof and of his claims, mortgage and note. The defendant declined to make such arrangement. There were no liens intermediate defendant's two mortgages on parcel No. 1. The owner of the mortgage on which the first judgment was obtained held as collateral thereto notes of defendant and another.

U. G. Paris, for applt.

I. Lawson, for respt.

Held, That plaintiff having been made a party to the foreclosures, and judgment having been had against him, the equity of redemption was cut off. He had no right of subrogation as to the first parcel as third mortgagee, the defendant holding the first and second mortgages. Nor under the circumstances as to the second. The plaintiff does not show that the payment of the first mortgage by him as a purchase on the sale will work him any injustice.

By the agreement (if any such could be made after foreclosure) between plaintiff and the mortgagor to protect the title, the plaintiff did not stand in the position of a surety. He appears to be one who has purchased a term of years for the consideration of paying off certain incumbrances. He is not a tenant paying rent. The agreement seems to indicate that the mortgagor did not assume to protect the lease, but rather the lessee the mortgagor.

Order reversed with costs, and motion for injunction denied with costs.

Opinion by *Learned, P. J.*; *Bockes* and *Boardman, J.J.* concurring.

CHANGE OF VENUE.

N. Y. SUPREME COURT. GENERAL TERM
FOURTH DEPARTMENT.

Dings, applt. v. Parshall, respt.

Decided April, 1876.

An action to compel the assignment of a bond and mortgage is local, and must be tried in the county where the land is situated.

Appeal from an order refusing to change place of trial from Onondaga to Wayne county,

The Mutual Insurance Company of New York had obtained a judgment of foreclosure on land in Wayne county, and the judgment had been assigned to one Williams, and this action is brought to compel Williams to assign the same to plaintiff on the ground that the assignment to Williams was fraudulent and void, and for damages by reason of the non-sale of the premises on the judgment.

A motion to change the place of trial from Onondaga to Wayne county was denied.

Geo. R. Collins, for respt.

T. W. Collins, for applt.

Held, That the order of the special term denying motion to change place of trial was erroneous. The action, under section 123 of the Code, was local, and must be tried in Wayne county where the land is situated.

Opinion by *Mullin, P. J.*

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BONDING TOWNS.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.Buffalo and Jamestown Railroad Com-
pany v. Weeks et. al.

Decided April, 1876.

Where a petition of the tax-payers of a town, signed by a requisite number, is made to bond said town in aid of a Railroad, the statute gives no right which the Railroad Company can enforce against the town, even where the Commissioners have entered into a contract pursuant to the provisions of the act of 1870.

This is on appeal from an order.

The town in which the village of Jamestown, in this State, is situated, had, by a petition of its tax-payers pursuant to statute, bonded for aid of the Buffalo and Jamestown Railroad Company, but the bonds had never been delivered to the company, although the Commissioners of said town had signed a contract pursuant to chap. 507 of the laws of 1870.

This was an application to compel a delivery of said bonds to the Railroad Company.

Held, That the mere signing of the petition to bond a town, and appointment of Commissioners thereunder gives no right to the Railroad Company either at law or equity which they can enforce against said town.

1. Because the Railroad Company is not bound to receive said bonds or to apply them to the construction of the road.

2. It cannot compel the persons appointed to issue the bonds, to sign and deliver them for the same reason.

3. Because they owe no duty at that stage of the proceedings to the Railroad Company.

That the act of 1869, under which these proceedings were instituted, provides in no way for the Railroad Company to compel officers of the town to issue bonds.

By the provisions of that statute a duty is doubtless imposed upon the Commissioners to subscribe for the stock of the Railroad Company and to issue bonds to pay for the stock which the courts may compel them to perform. But there is no contract between them and the town, and the Commissioners, and the Railroad Company, that the latter can in any way enforce.

While the proceedings remained in this way, the legislature might repeal the bonding act without violating the obligation of any contract. That by the act of 1870, chap. 570, the legislature has not authorized the Commissioners to agree with the Company to issue the bonds which the tax-payers have consented may be issued to the Company, and at no time was there a contract by which the Company became entitled to the bonds.

The duty of the Commissioners to issue bonds rests on the bonding act of 1869, and not upon the agreement authorized by the statute of 1870, chap. 507.

That the amendment to the Constitution which prohibits towns from bonding in aid of Railroad Companies, when it took effect, took from the Railroad Company the right to the bonds, and the Commissioners had no control over the bonds after this.

Opinion by *Mullen, J.*

LIFE INSURANCE. FORFEITURE OF POLICY.

U. S. CIRCUIT COURT. W. D. TENNESSEE

Anderson et. al., v. St. Louis Mutual Life Insurance Company.

The prompt payment of premiums, or of interest annually in advance on a premium note, where the policy by its terms requires such payments, is a condition precedent to a recovery on the policy.

Dividends may be first credited on the principal of outstanding notes, where such an agreement has been made or custom established between the parties by the course of business.

Equity cannot relieve against the forfeiture of a policy on account of non-payment of premiums or of interest on premium notes at the time required by the terms of the policy.

The question in this case came up on a demurrer to a bill in equity, which was filed by the plaintiffs as representatives of one A., deceased, for relief against the forfeiture of a policy of life insurance held by said A., and a decree for the amount thereof.

On the 15th day of October, 1867, the said A. insured his life with defendant in the sum of ten thousand dollars, the premiums to be four hundred and ninety dollars per annum in advance. The policy, which was issued to him, by its terms provided that if the two first annual premiums were paid and any default was made in any subsequent premiums, such default should not work a forfeiture, but the amount insured should be reduced to the sum of the annual premiums already paid. It also provided that "If the assured fail to pay annually in advance the interest on any unpaid notes or loans which may be owing by the insured to the company on account of annual premiums, the company shall not be lia-

able for the payment of the sum assured or any part thereof, and this policy shall cease and determine."

It further provided that "In every case where this policy shall cease or become null and void, all previous payments made thereon, and all dividend credits accruing therefrom, shall be forfeited to the said company."

A. failed to pay the premiums falling due subsequent to October, 1870, and also failed to pay the interest on the unpaid premium notes annually in advance.

A. died in 1872, and due proof of death was served on the company. The time for payment having elapsed, plaintiffs filed this bill, claiming the stipulation to pay the interest in advance was merely a penalty, and that the court would relieve against it.

Defendants demurred on the ground that the bill admitting that the interest had not been paid in advance and the policy providing in such case a forfeiture of the policy and all previous payments and dividend credits, there was no ground for relief.

Held, That nothing could be plainer than the language of the policy. The prompt payment of premiums is the very essence of life insurance. It is a condition precedent to the existence of the policy. Bliss on Life Ins., 253, 274; May on Ins., 406; 1 Disney, 355; 2 Disney, 106; 12 East., 133; 3 Hill, 161; 100 Mass., 500; 43 N. Y., 283; 8 H. of L., 745; 4 Vroom, 487.

And the company has the same right to insist on the prompt payment of a note, or of interest on the same in advance. 3 Bigelow, 780; 36 N. Y., 157; 19 Mich., 169; 100 Mass., 500; 1 Disney, 355.

Under the policy in question, the failure to pay the interest in advance

upon the premium note debarred the plaintiff of a recovery and worked a forfeiture of the premium already paid.

Also held, That although the general rule is that where money is paid upon a note, the law will first apply it upon the interest and then upon the principal, it must bend to a special usage or custom which has been established between the parties by the course of business. In the statements previously made by the company to the assured, the dividends had been deducted from the principal of his notes outstanding, and not from the interest upon the new notes which he gave in settlement. The interest was paid in cash. Such being the custom between them, all that the company was bound to do in crediting subsequent dividends was to apply them in the same way. If there is anything in the prospectus of the company to the contrary, the bill is demurrable in not setting it forth.

Also held, (following *Tait v. The New York Life Ins. Co.*, 4 Big., 479.) That equity has no power to afford relief in such a case as the present one.

Demurrer sustained.

Opinion by *Brown, J.*

MORTGAGE. TENDER.

N. Y. SUPREME COURT. GEN. TERM
FOURTH DEPARTMENT.

Dinga, resp't., v. *Parshall, applt.*

Decided April, 1876.

A junior mortgagee may redeem from a prior mortgage by paying the amount due thereon and the costs.

The tender of the amount due thereon by junior mortgagee for purposes of redemption is equivalent, if properly made, to the payment of the money, provided the money tendered is set apart and kept for such mortgagee.

The junior incumbrancer having paid the debt is entitled to subrogation.

Appeal from an order denying a motion to dissolve an injunction.

Defendant, P., is the owner of a certain judgment of foreclosure and sale on certain premises. Plaintiff is also the owner of a bond and mortgage junior to P.'s, on the same premises.

The property was advertised to be sold under P.'s judgment. Prior to time of such sale, plaintiff tendered to P. the amount due on his judgment, together with the costs, &c., and requested an assignment of his interest to plaintiff. The tender has since then been kept good, and P. duly notified of the fact. P. refused to assign, &c. Plaintiff also requested P. at time of tender to proceed and sell said premises, which P. also refused.

When the premises were advertised for sale the first time, crops were growing on the premises of the value of several hundred dollars. By the refusal of P. to sell as requested, the crops have been lost and plaintiff damaged.

After the tender as aforesaid, P. transferred said judgment to defendant W., who now claims to own the same.

T. W. Collins, for applt.

Geo. W. Collins, for resp't.

Held, That plaintiff, being a junior mortgagee of the premises in question, had the right to redeem them from the senior mortgage held by P., and to redeem he must pay the amount due thereon, together with all costs.

The tender of the amount due on the mortgage before sale by the junior incumbrancer, for the purpose of redemption, is equivalent to actual payment if properly made and the money so tendered is thereafter kept good and at some definite place for the prior mortgagee.

The junior incumbrancer having paid the debt of the prior incumbrancer, is entitled to be subrogated to the prior lien and all securities held by the prior incumbrancer, and he holds the premises for the amount paid on the first mortgage.

The tender to P. having been made before the assignment to W., and having been kept good, nothing passed by the assignment to W.

Order affirmed.

Opinion by *Mullin, P. J.*

MASTER AND SERVANT. NEGLIGENCE.

N. Y. COURT OF APPEALS.

King, *respt.*, v. The N. Y. C. & H. R. R. Co., *applt.*

Decided May 23, 1876.

Where the person who was the immediate cause of an accident is a contractor engaged in performing a specific work, the relation of master and servant does not exist, and the party employing him is not liable, unless the work contracted for is unlawful, or where an officer or public body charged with a certain duty commits its performance to another.

The owner of an implement or piece of machinery may lawfully allow another to take and use it, and if in using it becomes defective and causes injury to a third person, the owner is not liable.

This action was brought to recover damages for injuries sustained by plaintiff, alleged to have been occasioned by defendant's negligence. It appeared that in 1872 one D. entered into a contract with defendant to unload from barges and vessels, and place upon cars, all the railroad iron brought to the dock in Albany for defendant in that year, and defendant was to furnish a derrick to be used by D. in hoisting the

iron from the vessels. D. for several years before had had a similar contract with defendant. He had employed laborers to assist him in performing the contract, and among others the plaintiff, who knew of the contract with defendant. These persons were paid by D. The hook which fastened the boom of the derrick became worn and broke; the boom fell, striking and injuring plaintiff.

Matthew Hale, for *applt.*

Amasa J. Parker, for *respt.*

Held, That D. occupied the position of employer and master of plaintiff, and for his negligence, plaintiff's remedy is against him alone.

Also held, that in the absence of proof of a contract by defendant with D. to keep the derrick in repair, no duty to do so on its part could be inferred.

The owner of an implement or piece of machinery may lawfully allow another to take and use it, and if in using it it becomes defective and causes injury to a third person, the owner is not responsible, especially where the article is not in its nature dangerous, and is placed in the possession of a person competent to manage and use it. 4 C. B., (N. S.) 556; El., Bl. & El., 168; 7 C. B., (N. S.) 768. *Coughtry v. Globe W. Co.* 56 N. Y., 124, distinguished.

Plaintiff claimed that defendant agreed to keep the derrick in repair, but defendant's proof tended to show that the agreement was that defendant should make repairs when notified by D. that they were necessary. The court charged that in the absence of a special agreement as to the inspection and keeping in order of the derrick, it was defendant's duty to provide a suitable derrick and to keep it in order; and that if defendant was to make re-

pairs when notified by D., and no notice was given, yet defendant was liable if this agreement was not known to plaintiff, and the accident occurred from neglect to repair, and without negligence on the part of plaintiff; to which propositions defendant's counsel excepted.

Held, That the exceptions were well taken. In order to establish a liability of one person for the negligence of another, it is not enough to show that the person whose negligence caused the injury was at the time acting under an employment by the person sought to be charged. It must also be shown that the employment created the relation of master and servant between them; if the person who was the immediate cause of the injury is a contractor engaged in performing a contract to do a specific work, the relation of master and servant does not arise, and for the contractor's negligence while performing the work, the other party is not liable. 1 Seld., 48; 7 A. & E., 974; 5 B. & C. 547; 4 Exch., 241, 253; 8 N. Y., 222; 11 Id., 432.

This rule does not apply to a case where the thing contracted to be done is unlawful, or where a public duty is imposed upon an officer or public body, and the officer or body charged with the duty commits its performance to another. 17 N. Y., 104; Add. on Torts, 197.

Judgment of General Term, affirming judgment in favor of plaintiff, reversed, and new trial granted.

Opinion by *Andrews, J.*

LEASE. ESTOPPEL.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

O'Dougherty, *respt.*, v. Remington,
applt.

Decided April, 1876.

Where a person really having the title to land, allows another having the apparent title to go on and do certain acts, such person is estopped from questioning such acts.

Appeal from a judgment in favor of plaintiff.

This was an action for rent of certain premises situate in the city of Watertown.

In 1855 John O'D. was the owner of the premises in suit, and leased the same to defendants for twelve years, at an annual rental of \$600.

John O'D., prior to his death in 1862, deeded to one Anna M. O'D., wife of P. O'D., the premises in question, and gave deed to P. O'D. to deliver same to Anna on his death. P. O'D., after the death of John, delivered deed to Anna, but deed was not recorded until 1868.

In 1862, and after delivery of deed, Anna gave to P. O'D. power of attorney to lease or sell her real estate as he saw fit, and agreeing to adopt and ratify the same.

The rent was paid on said premises up to 1866 to P. O'D. P. O'D. was the only heir of John O'D.

In April, 1866, P. O'D. entered into a contract for the sale of premises for \$20,000, the purchase money to be paid during the month of May ensuing. By this contract \$500 rent was to be paid to P. O'D. up to July, 1866. This contract was never carried out.

This action was brought to recover \$450 rent, due by the terms of the lease on January 1, 1867, and was assigned by Mrs. O'D. to plaintiff, her son.

The conveyance by John to Mrs. O'D. was without any consideration other than love and affection, and de-

fendants never knew of the existence of this conveyance.

After the contract to sell the paper mill, defendants went into possession, made repairs, paid taxes and insurance, and collected rents from tenants living thereon, with the knowledge of P. O'D. A deed pursuant to said contract was afterwards made, and was in handwriting of Mrs. O'D. The defendants paid O'D. \$1,000 on purchase price, and were in possession up to September, 1869, when P. O'D. served on defendants a notice that he intended to rescind said contract. Mrs. O'D. was cognizant of and assented to the various transactions between P. O'D. and the defendants.

Held, That third persons had the right to treat with P. O'D. as the owner of said property, as the real owner concealed her title and acquiesced in and ratified his acts, and as between defendants and Mrs. O'D., she was estopped from questioning her husband's acts done in good faith under the power, and in equity she and the property was bound by his acts and contracts.

By the acceptance and occupation under the contract of sale the lease was ended, and their occupation was inconsistent with the relation of landlord and tenant. Mrs. O'D., for the purposes of this case, must be treated as the party contracting to sell, and that this lease was surrendered. That defendants not being in possession under the lease, they were not tenants, and no rent could be collected.

Judgment reversed.

Opinion by *Mullin, P. J.*

CONTRACTS AGAINST PUBLIC POLICY.

N. Y. COURT OF APPEALS.

Marsh, et al., applts., v. Russell, et al., respts.

Decided May 30, 1876.

A contract between several parties to engage in the business of furnishing recruits under an anticipated call for volunteers for the army, and which fixes a minimum price at which they are to be furnished, is not against public policy.

The complaint in this action set forth a contract between the parties to the effect that if either of them should make a contract with any of the towns of Washington county to furnish recruits, under an anticipated call for volunteers, that all gains or profits which might accrue in such business should be divided equally; that no contract should be made at less than \$500 per man without the consent of all. The complaint then alleged that the anticipated call was soon after made; that defendants entered into contracts as to various towns; that plaintiffs and defendants furnished men to fill said contracts, and large profits were made, which were received and retained by defendants.

Plaintiffs asked for an accounting, &c. The complaint was dismissed on the trial on the ground that the contract was upon its face against public policy.

Esek Cowen, for applts.

N. C. Moak, for respts.

Held, error; that the contract made the parties partners in furnishing recruits; that as it did not appear that the parties had control of any recruits, much less a monopoly of them, or that they could by the contract put up the price or embarrass the towns, or that the price was unreasonable, that it was not a necessary inference from the terms of the contract that the purpose

of the parties was an improper or unlawful one, or that its effect would be to thwart the policy of any law, or to injure or jeopardize any public interest: that the business of furnishing recruits was a lawful one, and could be carried on by individuals or firms; that when carried on by a firm its members could regulate the prices at which they would furnish the same as if they had been dealers in other articles. 43 N. Y., 147; 3 Met., 384. *Gedick v. Ward*, 5 Halst., 87; *Gardiner v. Moore*, 25 Me., 140; *Doolin v. Ward*, 6 J. R., 194; *Hooker v. Vandeventer*, 4 Den., 349; *Stanton v. Allen*, 5 Id., 534, distinguished.

Judgment of General Term, affirming judgment on report of referee dismissing complaint, reversed, and new trial granted.

Opinion by *Earl, J.*

AGREEMENT FOR SALE OF LANDS. MERGER.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Beach, et al., trustees, v. Allen.

Decided May, 1876.

An agreement that in case buildings burn, one will pay the amount of the liens thereon, is not an agreement for the sale of lands.

Merger will depend upon the intention of the parties.

Damages determined in a peculiar case.

The plaintiffs, trustees of a religious corporation, in October, 1870, exchanged their old church, which had been severed from the realty, for a \$500 mortgage owned by the defendant. On the mortgaged premises there was a prior mortgage of \$1,000 owned by one S. At the time of the exchange defendant executed an agreement that in

case the building on the mortgaged premises burned, he would pay the amount of the liens (the two mortgages) at the time the \$500 mortgage became due. In August, 1871, the mortgagor in the \$500 mortgage conveyed to one of the trustees, B., who agreed to pay the prior mortgage. In May, 1872, the building was burned. The plaintiffs paid up the prior liens. For a failure to pay interest, the plaintiffs, under a clause in the \$500 mortgage, elected that the whole amount should become due. Thereafter the trustees tendered the defendant a warranty deed of B. and wife of the premises to him, the \$500 bond and mortgage with the assignment thereof made by him to plaintiffs, and the mortgage of S. with satisfaction. Demand of the amount due on the two mortgages was made by plaintiffs before suit, and payment refused. The referee found that the plaintiffs were entitled to the amount due on the mortgages, and the defendant entitled to the deed, the satisfaction of the S. mortgage, and the \$500 bond and mortgage, and the assignment thereof.

D. P. Loomis, for aplt.

N. C. & M. W. Marvin, for respnt.

Held, That the building, severed from the realty, became personal property, and could be sold without any order of the court. The agreement of the plaintiffs and defendant was not void. It was not an agreement to sell lands. The defendant's agreement was similar to a guaranty that on a foreclosure sale a guarantor will bid a certain amount. The agreement is not void for want of mutuality. The trustees sold the church in consideration of the assignment of the mortgage and the execution of the agreement in suit.

The deed of the mortgagor to the trustee B. was not a payment or merger of the mortgage. The defendant agreed to pay the amount of the mortgages. He received a good title, and cannot complain. In such cases the intention of the parties will control as to merger. The referee erred in regarding the agreement as one for the purchase and sale of lands, and awarding specific performance. It is only an agreement with one person to pay a certain sum for premises of another. If the defendant had fulfilled his agreement the plaintiffs would have received the amount of their \$500 mortgage and interest. This, then, is the amount they have been damaged by the breach of the agreement.

Judgment accordingly, and without prejudice to the rights, if any, which the defendant may hereafter have, after such payment, to demand an assignment of the \$500 mortgage.

No costs to either party.

Opinion by *Learned, P. J.*

BIGAMY.

SUPREME COURT OF PENNSYLVANIA.

Gise, *plff in error*, v. The Commonwealth, *deft. in error*.

Decided May 18, 1876.

Bigamy consists in the unlawful contracting of a second marriage. Cohabitation forms no element of the offense, and does not perpetuate it day by day.

The statute of limitations runs from the time of the illegal contract of marriage.

In error to the Quarter Sessions of Luzerne county.

The plaintiff in error was indicted for bigamy. The defence set up the statute of limitations. The second marriage took place more than two

years before the commencement of the prosecution.

The court ruled that bigamy was a continuous offense, and that the statute did not apply.

The defendant was convicted and sentenced; and from this conviction he brings this writ of error.

Paxson, J.—What our statute forbids is the contracting of a second marriage during the lifetime of a former husband or wife. 2 Ired., 346; 1 Cox C. C., 34.

The doctrine, now for the first time asserted, that the continuing cohabitation is the offence, does not need an extended discussion. It is not necessary to allege or prove cohabitation upon an indictment for bigamy. 7 Greenl., 58; Gahagen v. The People, 9 Parker; 2 Ired., 347. On the contrary, a man may be convicted of bigamy who separated from his second wife at the altar, and never cohabited with her at all. The *gravamen* of the offense is the second marriage contract, by means of which the offending party fraudulently obtains dominion or control over the body of the other.

The doctrine of continuous offences is novel. No text writer in England or America has ever asserted it. No respectable authority has ever recognized it. It is wholly unknown to the criminal law.

There is a period in the history of every crime when it is completed, and the offender becomes liable to the penalties of the law. From that moment the statute of limitations commences to run. The crime of bigamy occurs and is complete when the second marriage is accomplished, and the statute would commence to run from that time.

The statute of limitations is a bar to this prosecution. The plaintiff in error

was illegally convicted and sentenced, and should be restored to his liberty.

Judgment reversed, and record remitted to the Quarter Sessions, with directions to carry the order into effect.

ACTION ON JUDGMENT. STATUTE OF LIMITATIONS.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

W. D. Miller, et al., *respts.*, v. Betty Brenham, ex'x, &c., *applt.*

Decided May 26, 1876.

Clerical error in defendant's name in Sheriff's certificate of service, does not vitiate judgment afterwards obtained.

Action may be maintained in this State on judgment barred in State where recovered by lapse of time.

Appeal from judgment recovered on verdict of jury.

This action was brought in 1873, on a judgment recovered in November, 1855, in the Superior Court of the City of San Francisco, California, by plaintiff against one Sanders and defendant's testator, C. J. Brenham.

The Sheriff's return of service endorsed on the summons in said action was as follows:

"OFFICE OF THE SHERIFF
OF THE
COUNTY OF SAN FRANCISCO." ss.

"I hereby certify that I received the within summons on the 5th day of November, 1855, and personally served the same on the 5th day of November, 1855, on defendant *Brennan* * * * by delivering to said defendant personally, in the city of San Francisco, a copy of said summons, attached to a certified copy of the complaint.

"Dated, San Francisco, this 8th day of November, A. D., 1855.

"DAVID SCANNELL,
"Sheriff.

"By E. W. CORBETT,
"Deputy Sheriff."

Defendant moved to dismiss the complaint on the ground that it did not appear on the record that service had ever been effected on Charles J. Brenham, which motion was denied. It was further argued that by the California statute of limitations, the judgment on a cause of action was extinguished after five years from the entry thereof.

C. M. De Costa, for *respt.*
Starr & Ruggles, for *applt.*

On appeal,

Held, That, as the sheriff's certificate stated the service to have been on the defendant, the name given was doubtless an error of the sheriff, as the names are quite similar. His statement is direct and positive that he served the defendant, which only could be true on the supposition that he was the person mistakenly called Brennan. The certificate was acted upon in the court where the action was brought, as showing proper service on the defendant thereon, and as no Brennan was named or was a party in the action, there is no doubt but what the proper defendant was served. Nor was the error such a variance as would be regarded as material under § 169 of the Code.

The not bringing of this action upon the said judgment within the period limited by the statute of California, neither discharged or extinguished the judgment, but merely deprived the party of the remedy. The statute did not affect the demand in any other respect. It is necessarily purely local,

and cannot be allowed to control the proceedings in this State for the collection of the judgment.

This action could only be barred by showing that the defendant had resided here the length of time required by our statute of limitation, when no presumption of payment arose. 5 Johns, 132; 11 Id., 168; 3 Id., 264; 13 Peters, 312; 21 Barb., 593; 43 Id., 214; 37 How., 145. Such residence was not shown.

Judgment affirmed.

Opinion by *Daniels, J.; Davis, P. J., and Brady, J., concurring.*

CONTEMPT.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

People ex rel Southworth v. Jacob Sharpe.

Decided May 26, 1876.

Efforts to induce stockholders to consent to a lease of a portion of a company's property, is not a violation of an injunction, forbidding the exercise of corporate privileges or interference with company's property.

Appeal from order refusing to punish the defendant for an alleged contempt.

In the two actions of *Sistare v. The Bleecker Street and Fulton Ferry Railroad Company*, and *Harlowe, Trustee, &c., v. same*, an order was entered on the 23d of December, 1875, practically consolidating the two actions, appointing *Alvan S. Southworth*, the relator, Receiver in both actions, with full power for the conduct and care of the said railroad, and enjoining the railroad, its officers, agents, servants, &c., from the exercise of any of its corporate privileges, from intermeddling or otherwise interfering with its property until further order of this court.

Thereafter the defendant in these proceedings, who is one of the company's managing directors, sought to gain the consent of several of the shareholders of said company to a lease of a portion of the property of said company, claiming that chap. 389 of the Laws of 1875, authorizes such lease upon the assent of a majority of the stockholders.

An order was thereupon obtained for defendant to show cause why he should not be punished for a violation of the said injunction.

The motion was denied on the ground that defendant's action was not such an intermeddling as the injunction contemplated.

Sullivan, Kobbe & Fowler, for applt.
Jno. M. Scribner & O. E. Bright, for applt.

On appeal.

Held, That we do not think the act complained of one for which the punitive power of the court should be invoked. It is consistent with an intention to observe and respect the order of this court.

Order appealed from affirmed.

Opinion by *Brady, J.; Davis, P. J.* and *Daniels, J., concurring.*

MARRIED WOMAN. PROVISION IN WILL.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Eisenlord v. Snyder et. al., exrs.

Decided May, 1876.

A direction by a testatrix, a married woman, to each of her children to give a note for past services rendered, does not make the claim for such services a charge upon the estate.

Action against executor for services rendered their testatrix as housekeeper.

Plaintiff when a child entered the family of the testatrix, a married woman, and lived there as a companion, receiving no wages as a servant. On arriving at full age, in 1849, she was told by the testatrix and her husband that she should be rewarded for her services. She remained in the family until the death of the testatrix. The testatrix, in her last sickness, expressed an intention to provide for plaintiff by will.

The husband failed in 1858. By will, made in 1871, the testatrix directed each of her children to give a note to the plaintiff "to be in full of her claims for past services."

Her estate proved insolvent. The devisees and legatees did not accept the devises and legacies. The testatrix never carried on any legitimate business.

The referee found for the defendants.

D. S. Morrell, for plff.

S. W. Jackson, for defts.

Held, That the clause directing payment to the plaintiff did not charge the payment on her estate. It is rather an expression of the motive for the legacy. It does not designate for whom the services were rendered. If the testatrix became liable it must be because she entered into a contract in which she expressed her intention to charge her separate estate. The referee finds she never did this, and that she never, for herself, employed the plaintiff.

This is the reasonable result from the evidence. Her intention seems to have been to make provision by will. This promise was performed.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Bockes and Boardman, J. J.* concurring.

ATTORNEY'S FEES. ILLEGAL CONTRACT.

U. S. SUPREME COURT.

Reuben Wright, *plff. in error* v. Jonas M. Tebbitts, *def. in error*. (October, 1875).

An agreement between an attorney and his client, entered into after the services have been rendered and are supposed to have been successful, that the attorney shall receive a per centage of the amount recovered, is not an illegal contract.

In error to the Supreme Court of the District of Columbia.

Wright, the defendant below, was a licensed trader in the Choctaw country at the commencement of the rebellion. He claimed to have sustained heavy losses during the war by the use by and taking and selling to the Indians of his goods and property, and for money advanced to the nation. By virtue of a treaty with the Choctaws and Chickasaws it was agreed that this claim with others should be referred to a commission to be appointed by the President, and that such sum as should be found due, should be paid out of any money belonging to the Indian nation in the possession of the United States. (14 Stat. 781).

He employed Tebbitts, the plaintiff below, an attorney at law, to present and prosecute his claim before this commission. Tebbitts accordingly appeared before the commission and presented an argument in support of the claim.

Wright afterwards executed to Tebbitts a memorandum in writing as follows :

"Jonas M. Tebbitts having rendered valuable services to me in securing my claims under the 50th article of the treaty of April 28th, with the Choctaws

and Chickasaws, I hereby bind myself to pay him one-tenth of whatever I may realize from the Choctaw Indians under said article whenever the money comes into my hands, which payment, when made, will be in full compliance with my verbal contract, made in April last, with John B. Luce."

Wright subsequently received \$20,541.28. Tebbitts brought suit for \$2,054, being ten per cent. on the recovery.

There was a judgment for this amount, from which the defendant took this writ of error, assigning as error that the contract was illegal.

1. Because it is an assignment of a one-tenth interest in the claim of Wright, and "not freely made and executed in the presence of at least two witnesses *after* the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof," as required by the Revised Statutes, § 3477.

2. Because it is tainted with immorality and illegality and is against public policy.

3. Because it was champertous.

Held, 1. There is no claim of any lien upon the fund. All that Tebbitts asks is that he be paid for his services after the money has been collected and in accordance with the agreement.

2. Tebbitts was not engaged in any improper or illegal service. He appeared before the commission and presented an argument in behalf of his client. This is all he did or engaged to do. It was legitimate service rendered in a legitimate employment. Such services rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable.

The commission which acted on this claim was in fact a *quasi* court. There is nothing illegal, immoral, or against public policy in a professional engagement to present and prosecute such claims before such tribunals.

3. We have held in *Wylie v. Cox*, 15 How., 415, that an agreement to pay a reasonable per centage upon the amount of recovery is not an illegal contract.

In this case, after the services were rendered, and, as supposed, the claim had been secured, Wright agreed to pay ten per cent. of the amount eventually realized as compensation for the labor performed.

We see no reason to find fault with this rule, which the parties established for themselves, as presenting the true criterion for estimating the reasonable value of the services.

Judgment affirmed.

Opinion by *Waite, Ch. J.*

FRAUDULENT ASSIGNMENT. CONSIDERATION.

N. Y. SUPREME COURT. GEN'L TERM.
THIRD DEPARTMENT.

Stacy, receiver, *respt.* v. Gilbert Desham et. al., *appls.*

Decided May, 1876.

Evidence that the judgment debtor believed the note paid upon which judgment was recovered, is competent upon the question of intent in an action to set aside an assignment by him as fraudulent.

*The value of the assigned property may always be shown.
Services are a good consideration for such an assignment.*

Action by a Receiver in supplementary proceedings to set aside, as fraudulent, an assignment by defendant, Gil-

bert Desham, to one George Desham, a co-defendant, of a contract for the purchase of land. The answer denied the fraudulent intent.

E. A. Chaffee, for resp't.

Swift & Sanford, for appls.

Held, That evidence that at the time of the assignment Gilbert D. believed the note (the same being an accommodation note) was paid, on which the judgment was recovered and the supplementary proceedings instituted, was improperly excluded. It might have some influence on the question of the intent to defraud.

The value of the assigned property may always be shown as it is important on the question of fraud.

Where the answer contains a general denial, except as admitted, only admits that the defendant slightly improved the premises while in his possession under the contract, and there is no allegation in the complaint of their previous value, it is error to exclude evidence of value as inadmissible under the pleadings.

Services rendered are a valuable consideration for such an assignment, and acceptance of property in payment of such debt is a valid transaction.

Order denying motion for new trial reversed, the judgment set aside, and a new trial granted, with costs to abide the event.

Opinion by *Learned, P. J.*; *Boardman, J.*, concurring.

WILLS. CONDITIONAL LEGACY.

ENGLISH HIGH COURT OF JUSTICE.
CHANCERY DIVISION.

Taylor v. Lambert.

Decided March 9, 1876.

A legacy which is made payable upon the happening of a certain event is a conditional one; and that event not happening, the legacy sinks into the residue.

The testator by his will left to each of his younger sons the sum of £1,000 which he charged upon his estate at A., but directed that said legacies should not be paid until his eldest son should come into actual possession of the M. estate. He also devised his estate at A. in fee, subject to these legacies, to his eldest son.

At the date of the will the M. estate was limited to the use of one Lady F. during her widowhood, with remainder to testator for life, with remainder to testator's eldest son, with remainder to his issue in tail male.

The eldest son, subsequent to the death of testator, conveyed the estate at A. to plaintiffs who retained the amount of the legacies out of the purchase price, and who covenanted to pay said legacies when they became due, or if the younger sons should not become entitled to the legacies, then to pay the amount thereof to the executors of said eldest son immediately after his death.

Thereafter the eldest son died without having come into actual possession of the M. estate.

The executors having commenced an action against plaintiff to recover the amount of the legacies under his covenant, he filed this bill to ascertain who were entitled to said amount, and to restrain further proceedings in the said action.

Held, The construction of the will is clear. The testator gives the estate at A. to his eldest son, and charges it with certain legacies. At the same time that he thus gives he qualifies his gift with a condition that it shall be of

no effect unless his eldest son comes into actual possession of the M. estate. In this case it is not in the first instance an absolute gift. In one sentence and with one breath he says, "I give £4,000, but I do not give it unless the M. estate comes into possession of my eldest son, who is owner of the A. estate." No sum can be raised or become payable until that event happens. No intention can be imputed to the testator other than that which he has expressed. No man with any knowledge of the English language could read this will in any other sense than that the gift is wholly conditional on the eldest son becoming owner of the M. estate, and that then, and not till then, these legacies were charged on the A. estate.

Opinion by *Bacon, V. C.*

STATUTE OF FRAUDS.

N. Y. SUPREME COURT. GENERAL TERM
FOURTH DEPARTMENT.

Tisdell, respt. v. Morgan, applt.

Decided April, 1876.

An agreement by which one creditor assumes the debt of another creditor and takes security from their debtor for his own debt and the one assumed, and the other creditor releases the debtor, is not within the statute of frauds.

Although the complaint may not have covered case as proved, where the evidence is not objected to, the court on appeal will dispose of case as though the pleadings were amended on trial.

Plaintiff and defendant's intestate were creditors of one H., and sometime in 1868, they both met H. in New York for the purpose of securing their debts. It was there arranged that defendant's intestate should advance to H. some cash and assume plaintiff's debt and take from H. a conditional sale of his canal boat.

This arrangement was thereupon carried out. H. made the bill of sale, defendant's intestate verbally assumed plaintiff's debt, and plaintiff therefore released H. Some of plaintiff's debts were afterwards paid by freights received from H. under the same agreement, and this action was brought for the balance.

There was judgment in the court below for plaintiff.

J. A. & A. B. Steele, for applt.

J. J. Duddelston, for respt.

Held, That the agreement of defendant's intestate to assume and pay plaintiff's debt under the circumstances was valid and not within the statute of frauds.

That although the complaint may not fully cover the case as proved on the trial, still the evidence having been received without objection, the complaint will be assumed by this court to have been amended on the trial and disposed of accordingly.

Judgment affirmed.

Opinion by *Noxon, J.*

QUESTION OF FACT.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Berry v. Jackson.

Decided May, 1876.

Where evidence is conflicting the court will not review a question of fact.

Appeal from a judgment of the Fulton County Court affirming a judgment of a justice's court.

This action was brought for the conversion of certain lumber sawed by the defendant from logs of plaintiff. The evidence was very conflicting. The defendant did not ask for a new trial in the County Court.

R. H. Rosa, for applt.

Parkhurst & Baker, for respt.

Held, That there seems to be no question of law. The court cannot review a question of fact on such contradictory evidence.

Opinion by *Learned, P. J.*

MUNICIPAL CORPORATIONS. LIABILITY OF.

N. Y. COURT OF APPEALS.

Smith, applt. v. The Mayor, &c., of New York, respt.

Decided May 30, 1876.

A municipal corporation does not insure citizens against damage from works of its construction, but is only liable for negligence or willful misconduct.

This action was brought to recover damages sustained by plaintiff by reason of the stoppage and overflow of one of defendant's sewers.

The referee found that the overflow was caused by a stoppage of the sewer with sand and dirt washed in from the street, and that at or just before the flooding of plaintiff's premises there was an unusually heavy shower of rain.

There was no proof of any obstruction before that time, and there was no evidence or finding that the sewer was liable to become obstructed under ordinary circumstances so as to require the watch and care of the officials, or that it had been obstructed for a time and under circumstances from which it might be assumed that the officers of the city knew or ought to have known of the obstruction.

Henry Parsons, for applt.

D. J. Dean, for respts.

Held, That defendants were not liable; that they could only be made lia-

ble upon proof of some fault or neglect on their part, either in the construction of the sewer or in keeping it in proper repair; that in order to recover plaintiff was bound to show a neglect by defendants to remove the obstruction after notice of its existence, or some omission of duty on the part of the city officers in looking after it and seeing that no obstruction occurred.

Also held, That the city does not insure citizens against damage from works of its construction, but is only liable as other proprietors for negligence or willful misconduct—37 Barb. 292; 36 N. Y. 54; 5 Seld. 456; 45 N. Y. 194; 59 Id. 500.

Judgment of General Term, affirming judgment in favor of defendant affirmed.

Opinion by *Allen, J.*

ADMINISTRATORS. SUITS BY. N. Y. SUPREME COURT. GEN'L TERM, FOURTH DEPARTMENT.

Nichols, respt., v. Smith, applt.

Decided April, 1876.

On a judgment recovered in a foreign country the administrators of the deceased judgment creditor may maintain an action in their own names in this State.

Appeal from an order sustaining a demurrer.

In 1872, one Samuel Dixon, residing in Canada, recovered in that country a judgment against defendants.

Plaintiffs are the administrators of Dixon, and commenced this action in this State on such judgment. The complaint stated that Dixon had no creditors in this State.

Defendants demurred that the complaint did not state facts sufficient to constitute a cause of action, and that

plaintiffs did not have legal capacity to sue.

The demurrer was sustained.

John H. White, for applt.

Rhodes & Richardson, for respt.

Held, That plaintiffs may maintain this action in this State in their own names. The title to the judgment was absolutely in them and may be prosecuted here. The judgment is to be used on this trial to show and establish their title, and the amount they are entitled to recover.

There is no reason why a recovery may not be had in this case in the individual names of plaintiffs as well as in an action on a promissory note or other chose in action.

Order reversed.

Opinion by *Nixon, J.*

EXECUTED CONTRACT. IMMORAL CONSIDERATION.

SUPREME COURT OF PENNSYLVANIA.

Fasig, plff. in error, v. Levan et ux. defts. in error.

Decided March 10, 1876.

Although an action cannot be maintained upon an executory contract, the consideration of which is immoral; when the contract has been executed, the law will not restore them to their former condition.

Error to the Common Pleas of Berks county.

Ejectment by L. and wife to the use of the wife against Mary F. for a dwelling-house and lot of ground in Reading.

Mary F., the defendant, in 1866, was an employee of L., the plaintiff, by whom she was seduced, and who, afterwards, during her pregnancy, caused her to submit to an operation for abortion which produced a dangerous ill-

ness. In 1868, said L. desiring to make reparation for this injury, and as he did not want her to be disgraced or become a woman of the town, assisted her in the purchase of the premises in question. The deeds were executed and delivered. L. paid the purchase money, saying that \$1800 of it were the earnings of defendant, and the rest a loan, for which he took her judgment bond, which was afterwards surrendered to her and cancelled without payment.

L. and F. continued their illicit intercourse until 1871, when a judgment was obtained against L. and the premises levied upon and sold by the sheriff as his property to one Koch, under whom the plaintiff's wife shows title.

On the trial the court charged the jury that if they should find that the purchase money was paid by L., then a resulting trust would be created in his favor, which could only be defeated by the declarations and acts of the parties accompanying the transaction. And the court further charged:

"In the absence of precedent we are to decide this case upon the well-known principle of law, that an immoral consideration will never support a contract; to hold this title to be valid in Mary A. F., under the evidence in this case, the court and jury would but set a premium on immorality and encourage infidelity to the marriage relations."

There was a judgment for plaintiffs, from which the defendant took this writ of error.

Held, That there is nothing in the case to show a resulting trust; that the purchase money was a gift from L. to defendant.

That the doctrine that "An immoral consideration will not support a contract," does not apply to this case. The defendant is not seeking to enforce such

a contract. If any contract existed, it was fully executed.

This is a case of a man who has wronged a woman, who has made her a compensation for that injury, and who now seeks to recover it back. In this the law will not help him.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by *Pazson, J.*

WEIGHT OF EVIDENCE. NON-SUIT.

N. Y. SUPREME COURT. GENERAL TERM,
FOURTH DEPARTMENT.

Hodgkins, applt. v. Van Ambel, et al., respts.

Decided April, 1876.

A non-suit should only be ordered where the evidence on either side is so clear and undisputed that a verdict in conflict with it could not be sustained.

On a motion for a non suit all disputed facts are to be decided in favor of plaintiff.

Appeal from a judgment at circuit.

This action was brought to recover a quantity of lumber claimed to be the property of the plaintiff.

One G. purchased of defendants 10,000 feet of spruce lumber. Plaintiffs purchased of G. the lumber he bought of defendants and paid him for the same. About the time of this sale by G. to plaintiff, they saw Van A., one of defendants, who stated that G had 10,000 feet of lumber at their mill. Plaintiff then asked Van A. if he would just as soon deliver it to him as to Gates, and he said he would. G. then told Van A. to deliver the lumber to plaintiff and Van A. agreed.

Plaintiff and Van A. also had other conversations in which Van A. told

him to come and get it when he pleased, and that it was all understood, and plaintiff replied he would get it in good sleighing, &c. This testimony was confirmed by one of plaintiff's witnesses, and also denied by defendants and others.

Finally defendants refused to give plaintiff any of the lumber, and this action was brought.

On the trial at the circuit plaintiff was non-suited on the ground that he had made no case.

J. B. Emmons, for applt.

E. S. Merrill, for respt.

Held, That the nonsuit was error. A non-suit should only be directed where the evidence on either side is so clear and undisputed that a verdict in conflict with it would not be sustained.

That the question of fact in the case was a disputed one, and on a motion for a non-suit all the disputed facts must be decided in favor of plaintiff, and this the court could not do.

Judgment reversed.

Opinion by *Noxon, J.*

FIRE INSURANCE. WAIVER OF CONDITION.

N. Y. COURT OF APPEALS.

Church, applt., v. The Lafayette Fire Insurance Co., of Brooklyn, respt.

Decided May 23, 1876.

Payment of the premium at the time of making a contract of insurance is not necessary to bind the company; and if a credit is given by the agent, the contract is equally obligatory.

An agent may waive such payment and give such credit.

The question of waiver is for the jury to determine.

This was an action upon a policy of fire insurance. The evidence showed a

prior dealing of plaintiff with defendant for many years, and that he was in the habit of getting policies without paying the premium at the time; that plaintiff, on Sept. 6, 1871, called at the company's office to get the property in question insured, saw defendant's secretary, and tried to have the old rate reduced, which the secretary refused to do, and plaintiff then replied, "Very well, I must have it insured." The next day defendant made out the policy by which it insured the building from September 6th. Plaintiff called again on the 9th, and asked the secretary if he had taken the building; he replied he had at the old price. Plaintiff made no objection, and no further conversation took place. On October 16, 1871, plaintiff again called to obtain insurance upon other property. The secretary was not in, but the plaintiff stated to defendant's clerk that he had another policy, and would pay for the two together, and the clerk replied "Very well." Plaintiff did not call again until November 8th, after the fire, which took place November 7th. He informed the secretary of the loss, and offered to pay for the two policies, but the secretary refused to take anything on the policy in suit, stating that defendant was not liable because the house was unoccupied. A few days after the plaintiff paid the premium upon the second policy from its original date, which was accepted. At the close of plaintiff's evidence defendant's counsel moved for a nonsuit on the grounds, that there was no evidence of any contract of insurance, and that if a contract was proved it was the contract in the written policy, and it never became binding on defendant because the policy provided that it should not be binding until the premium was actually paid.

Plaintiff's counsel requested the court to submit the whole case to the jury whether or no there was a contract. The court refused to do so. He also requested the court to submit to the jury the question whether or no defendant had not given plaintiff credit on the policy in question. The court refused to do this, and nonsuited the plaintiff.

N. C. Moak, for applt.

Philip S. Crooke, for respt.

Held error. That the fact that defendant had on former occasions given plaintiff credit for premiums was for the jury to consider on the question of waiver of the condition in the policy. 59 N. Y., 521; 26 Id., 465. That the evidence was sufficient to leave to the consideration of the jury the question whether a credit was not intended to be given, and payment of the premium when the policy issued waived, and considering the circumstances and previous dealings of the parties, it could not be held as matter of law that there was no waiver and no credit given.

Payment of the premium at the time of making a contract of insurance is not necessary to bind the company, and if a credit be given by the agent it is equally obligatory. 59 N. Y., 171. An agent may waive such a condition and give such credit. 35 N. Y., 131; 26 Id., 460.

Judgment of General Term affirming judgment of nonsuit, reversed and new trial granted.

Opinion by *Miller, J.*

RAILROAD COMPANIES. LIABILITY FOR ANIMALS KILLED AT CROSSING.

SUPREME COURT OF MISSOURI.

Holman v. The Chicago, Rock Island & Pacific Railroad Co.

Decided May, 1876.

In an action against a railroad company for killing an animal at a crossing, it is not sufficient to show that the employees of the company neglected to ring the bell or sound the whistle in order to authorize a verdict against the company, but it must also be shown that such negligence caused the damage.

This was an action to recover damages for the killing of a cow belonging to the plaintiff, by a train on defendant's railroad, in a street of the town of Cameron.

On the trial plaintiff introduced testimony to show that the bell was not rung, nor the whistle blown, as the train approached and ran over the cow.

Defendant introduced one Riley, the conductor of the train, who testified that the bell was rung and the whistle sounded.

There was a verdict and judgment for plaintiff, from which defendant appealed.

Held, That conceding that the servants of defendant neglected to ring the bell or sound the whistle, the question is, whether there is any evidence tending to show that the cow was killed by reason of such neglect; that there is no necessary connection between the failure to ring the bell, or sound the whistle, and the killing; that both may concur in point of time, and the latter not be the result of the former (58 Mo., 503); that the connection must be proved by the party alleging its existence. All the facts and circumstances attending the killing should be shown, so that the jury may rationally conclude whether it resulted from such negligence or from other causes.

In the case at bar no such evidence was offered. But two facts were shown to fix defendant's liability; the failure

to give the required signal, and the killing. No fact tending to connect the two was shown.

Judgment reversed, and cause remanded.

Opinion by *Hough, J.*; *Wagner, C. J.*, and *Napton* and *Sherwood, J. J.*, concurring.

SERVICE OF SUMMONS BY PUBLICATION.

N. Y. SUPREME COURT. GEN'L TERM,
FIRST DEPARTMENT.

In the matter of the application of the Atlantic Giant Powder Company and the Giant Powder Company to vacate and set aside an order directing service by the publication of the summons in an action brought by Israel Hall and others against the Atlantic Giant Powder Company and others.

Decided May 26, 1876.

An order directing service of summons by publication against a non-resident corporation will be sustained under §135 of the Code, when the subject of the action is personal property, within the State, and the transactions in controversy took place here, and the cause of action arose here.

Appeal from order denying motion of the Atlantic Giant Powder Company and the Giant Powder Company to set aside order directing publication of summons and service of summons by publication.

The action in which the order directing the service by publication was made was an action brought by Israel Hall and others, against T. P. Shaffner, the Atlantic Giant Powder Company, the United States Blasting Oil Company and others, by the plaintiffs as stockholders of the U. S. Blasting Oil Com-

pany, to recover stock alleged to have been fraudulently obtained from plaintiffs in accordance with a scheme or conspiracy between various of the defendants, including the powder companies, and also for the purpose of setting aside certain judgments alleged to have been collusively obtained against the U. S. Blasting Oil Company, and also for the purpose of setting aside certain assignments of valuable patents from the Blasting Oil Company to the Atlantic Powder Company.

Both the Powder Companies were non-resident corporations, existing under the laws of the State of California.

The application for the order directing the publication of the summons was obtained upon the complaint, in the action, and upon an affidavit showing that after diligent inquiry, deponent has been unable to find the President, Secretary, Cashier, Treasurer, Directors, or Managing Agent of either of the said companies, defendants. And on information and belief, stated that the officers of both companies resided in the State of California.

The following are some of the points urged by the appellants on the appeal.

1. That no court should assume the exercise of jurisdiction when it cannot make its decree effective.

2. That the relief sought in the present case is really *in personam*. The decree could not be enforced upon any one; nor would it be regarded as a judicial determination in any other jurisdiction.

And on behalf of the respondent the following among other points were urged: 1. That the order directing the publication must stand, because it is authorized under the provisions of the

Code, § 135. The effect of the service is not involved in the discussion.

2. The affidavit and complaint show that the subject of the action is personal property within the State, and the defendants claim an interest.

James C. Carter, for applt.

E. N. Taft, for respt.

Held, That the allegations of the affidavit and the plaintiff's complaint in the action on which the order of publication was founded are to be deemed to be admitted for the purposes of this motion. That the appellants are proper and necessary parties to the action. The cause of action arose within this State. The judgment, the invalidity of which is asserted by the appellants, was recovered and entered in this State, and the transfer of the rights and franchises of the United States Oil Blasting Company is alleged to have been made within this State. The subject matter or corpus of the action is the title to the shares, rights and franchises of that Company as a New York corporation.

Order of Special Term affirmed.

Opinion by *Davis, P. J.*; *Daniels and Brady, J.J.*, concurring.

SUBROGATION.

N. Y. COURT OF APPEALS.

Cole, respt., v. *Malcom*, impl'd, &c. applt.

Decided, June 6, 1876.

The doctrine of subrogation is applicable where a party is compelled to pay the debt of another to protect his own rights or to save his own property. (Reversing S. C. 7 Hun. 31; 2 N. Y. Weekly Dig. 454.)

This is an appeal from an order of General Term, affirming an order of Special Term, denying a motion made by defendant, *M.*, to compel an assign-

ment to him of certain judgments held by one H. K. M., plaintiff's assignee.

It appeared that prior to December, 1869, defendant, C., owed plaintiff \$4,000. He at that time owned certain land, which he conveyed through a third party to his wife without any consideration, for the purpose of vesting the title in her. She died intestate, in 1870, leaving no children, and the land passed to her heirs, of whom the defendant, M., was one, and he has since, by purchase, succeeded to the rights of nearly all the others. Plaintiff commenced an action against C., after the death of his wife, and recovered judgment for the amount of the debt due him, and issued execution thereon, and had the same returned unsatisfied. He then commenced an action against C. and the heirs of his wife, to set aside the conveyance of the land as a fraud upon the creditors of C., and obtained a judgment setting it aside, and declaring plaintiff's judgment a valid lien and charge upon the land, and appointing a receiver to sell the same to pay plaintiff's judgment and the costs of the action. That judgment was affirmed by the General Term and the Commission of Appeals. The receiver some time afterward advertised the land for sale, in pursuance of the judgment. Before the day of sale defendant, M., tendered to H. K. M., to whom plaintiff had assigned his judgments, the amount due, and demanded an assignment thereof to him. H. K. M. refused to assign. Defendant thereupon obtained an order staying the sale and made this motion.

John R. Dos Passos, for applt.

Hamilton Odell, for resp't.

Held, That defendant M. was enti-

tled to be subrogated to all the rights and securities of the judgment creditor. 3 Paige, 117; 5 Id. 285; 11 Id., 21; 3 Barb. Ch. 169; 42 N. Y., 89; 6 Hun. 632; 2 Brock., 159; 23 Penn. 294.

The equitable doctrine of subrogation is applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property. 23 Penn. 294; 2 Brock. 159.

Also held, That as the title of the heirs of C.'s wife is good as against C., when they pay the judgments against him to save their land they pay his debts, and they should have subrogation against him.

Order of General and Special Terms reversed, and motion granted.

Opinion by *Earl, J.*

FRAUD.

N. Y. SUPREME COURT. GENERAL TERM FOURTH DEPARTMENT.

Ephraim H. Fish and John L. Lent, *applts.*, v. Willoughby Payne, *resp't.*

Decided April, 1876.

A mere purchase of goods, unaccompanied by any fraudulent representations, is not of itself fraudulent, although the purchaser is insolvent at the time, and has knowledge of the fact.

Appeal by plaintiffs from a judgment of the County Court, in favor of plaintiffs, rendered in a justice's court.

The action was brought by the plaintiffs against the defendant to recover damages for wrongfully and fraudulently obtaining goods to the value of \$61.41, with the fraudulent intent and preconceived design not to pay the plaintiffs for the same, and with the wrongful intent to cheat and defraud the plaintiffs of the same and the

value thereof. The plaintiffs had judgment in justice's court for the value of the goods and costs.

On the trial it appeared that the plaintiffs during a period of two years had sold the defendant goods at different times, on a credit of thirty days; that the defendant was a peddler, engaged in selling goods bought of the plaintiffs, and had paid his bills to the plaintiffs up to the time of his last purchase of the plaintiffs, amounting to \$61.41; he was insolvent, and had knowledge of the fact, but did not disclose his condition, although he received his usual credit of thirty days.

L. J. Barrows, for appls.

Charles St. Searles, for respnt.

Held, That it was not fraudulent in the defendant, although he was embarrassed, to make any effort he could to relieve himself from his embarrassment. Instead of preconceiving a design to defraud and cheat, which nowhere appears in the testimony, his purchase appears to have been made in the ordinary business way. There was, therefore, no fraud committed by the defendant, and the judgment of the justice should have been for the defendant.

Opinion by *Noxon, J.*; *Mullin, P. J.*, and *Smith, J.*, concurring.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT. U. S. CIRCUIT COURT—NORTHERN DISTRICT OF OHIO.

William Brice et al. v. Henry Sommers et al.

Decided May 20, 1876.

The act of Congress only authorizes a removal where application therefor is made before final hearing or trial, and this means before final judgment in the court of original jurisdiction,

An application made after an appeal has been taken, is too late.

On the 18th of November, 1872, William Brice & Co. filed their petition in the Common Pleas of Stark county, against Henry Sommers and others, among whom was the defendant Trimble, to foreclose a mortgage given by said Sommers on twenty acres of land in Stark county, and on which they claimed \$7,107.01.

Defendant Trimble, in defense, claimed title to the premises by virtue of a sale to him by the United States Collector of the district for unpaid taxes which had been assessed against plaintiffs, defendant Sommers and others under the internal revenue laws, they being engaged in the distillery business on the premises, and that such taxes were a superior lien to the mortgage.

Plaintiffs replied and joined issue, which was found in favor the defendant Trimble, at the February term, 1874, and a decree was entered dismissing plaintiffs' petition.

Plaintiffs thereupon appealed to the District Court of Stark county.

On the 30th of September, 1875, and whilst the cause was so pending, defendant Trimble filed this petition for removal to this court on the ground that the action affects the validity of the internal revenue laws of the United States.

Plaintiffs now file their motion to dismiss the petition

1. Because the case, prior to filing the petition, had been finally heard and tried, and a final decree entered therein, and therefore this court has no jurisdiction.

2. Because of other manifest reasons apparent on the face of the proceedings.

Held, That the application for removal is too late. It was held in *Stevenson v. Williams*, 19 Wallace, 572, that a removal is only authorized where an application is made before final

judgment in the court of original jurisdiction where the suit is brought.

This construction is supported by the phraseology of the section of the statute itself. It provides that where any civil action or suit is *commenced*, not *pending*, in a State court, &c.

These expressions of the act seem to refer alone to cases pending in the State court in which they were commenced. Any other construction would, in effect, make this an appellate court from the Court of Common Pleas, making the State District Court a mere highway to reach this court by way of appeal. To reach this court parties could try the case in Common Pleas, and on defeat appeal to the District Court, and while the case was there pending, file the petition here for removal, and then retry the case in this court.

Counsel for defendant Trimble claimed that as two terms of the Circuit Court had been held after the filing of the transcript and pleadings and before the motion to dismiss was filed, it was too late to do it then.

Held, That if plaintiffs had appeared and pleaded in the case after such filing, it might be regarded as a waiver of the right to make the motion, and an admission of the jurisdiction of this court; but as they did not do so, the objection is not well taken.

Motion to dismiss sustained.

Opinion by *Welker, J.*

FIRE INSURANCE.

U. S. CIRCUIT COURT—DISTRICT OF KANSAS.

Ann Kelly v. Home Insurance Company of New York. (June, 1875.)

A condition in a policy that if the premises shall become vacant or unoccupied and so remain with the knowledge of the assured, without notice to and consent of the company in writing, the policy should be void,

contemplates an abandonment of the premises as tenantable property or a vacancy for an unreasonable time.

Motion for a new trial.

This policy, upon which this action was brought, contained the following condition:

"If the above mentioned premises shall become vacant or unoccupied, and so remain with the knowledge of the assured * * * without notice to or consent of this company in writing * * * this policy shall be void."

At the time of the fire the premises had been unoccupied for thirty-three days. Plaintiff knew of it, but gave no notice to the company. During that time she was engaged in endeavoring to procure a tenant for the house and had not abandoned it.

The court on the trial instructed the jury that the plaintiff was entitled to recover.

Foster, J.—The condition in the policy is a peculiar one, and its meaning is somewhat obscure. Just what meaning was intended to be conveyed by the words "and so remain," is not apparent, but it is certain that they qualify the condition, and make it something more than a mere temporary vacancy, such as would occur while one tenant is moving out and another moving in.

The vacancy or want of an occupant, of itself, however brief, is not enough to avoid the policy, but the vacancy must *remain so*. It must be either an abandonment of the premises as tenantable property, or the vacancy must have continued an unreasonable time.

When there is doubt in the condition restricting the liability of the company, the construction most beneficial to the premises should be adopted. 32 N. Y. 405.

In this case, whichever construction we adopt in interpreting the policy, I cannot see that the company can avoid its liability.

If it contemplates an abandonment of the premises, this is not such a case, for there was no abandonment.

If its liability was to terminate on the the vacancy continuing an unreasonable length of time, then I could not hold that an unreasonable time had transpired. If the company desired to limit the time of its liability to thirty days, it was very easy for them to have expressed it in plain and unmistakable language.

Motion overruled.

BANKRUPTCY. RIGHT OF ASSIGNEE TO PROPERTY PURCHASED IN WIFE'S NAME.

U. S. CIRCUIT COURT. DISTRICT OF NEW JERSEY.

Muirhead, assignee, &c., *applt.*, v. Thomas Aldridge and Annie Aldridge his wife, *respts.*

Decided March 28, 1876.

An assignee in bankruptcy is entitled to property which has been purchased in the name of the bankrupt's wife, where it is shown that the wife contributed but little towards its purchase, and the husband has increased its value by his own time and labor.

A debtor cannot deprive his creditors of the product of his labor, by putting it in the form of property only nominally acquired by his wife.

This bill was filed by the assignee in bankruptcy of the defendant, Thomas Aldridge, to obtain a conveyance to him, as such assignee, of certain real estate, therein described, the title to which is in his wife's name; but which it is claimed, in truth belongs to him.

Defendant's set up that the property in question was acquired and conveyed to the wife during coverture, and that it is her separate property.

During nine years, twenty-one pieces of real estate were purchased for and conveyed to the wife. The husband took entire charge of the estate, and by

selling, exchanging, and building upon the property, he increased its value so that it is now worth \$20,000. She did no more than contribute \$3,000 towards the purchase money, and consult with him in regard to the property; or, in her own words, she did such things "as it was necessary and proper for a lady to do."

When the husband filed his petition in bankruptcy, two years after the last purchase, his schedule was barren of any available assets.

Held, That when the title to real estate is conveyed to a married woman, she must be considered a *bona fide* owner of it, the same as if she were a *femme sole*. But it must be entrenched in good faith. If it is purchased by her or for her, no matter by whom, its validity cannot and ought not to be questioned. But if she has no separate estate, or one disproportionately small, as compared with the consideration ostensibly paid by her, and deficiencies are supplied from resources, whether money or its equivalent, of her husband, which he could not rightfully apply, such a transaction does not deserve any legal sanction.

Also held, That while a debtor cannot be compelled to labor for his creditors, he cannot divert the product of his labor to his own benefit, by putting it in the form of property only nominally acquired by the wife; and that where his nominal agency for the wife is used as a device to cover his acquisitions, under the name of his wife, it will prove unavailing.

Also held, That the real estate in question is really the property of the husband; that the title to it was vested in the wife in fraud of creditors; and that a decree should be entered for its conveyance, in accordance with the prayer of the bill.

Opinion by *McKenna*, *Cir. J.*

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SUPPLEMENTARY PROCEEDINGS. CONTEMPT.

N. Y. SUPREME COURT. GEN. TERM.
FOURTH DEPARTMENT.Lewis Gaylord, *respt.* v. Richard Jones, *applt.*

Decided April, 1876.

A second order of same nature in supplementary proceedings supersedes the first, and for disobeying first order party cannot be punished as for a contempt.

A judgment was recovered against the defendant and appellant and an execution issued thereon returned unsatisfied.

An order in supplementary proceedings was made and served by the sheriff, and he made his certificate thereof. The certificate was not sworn to, and he certifies to having served a summons and complaint, and he did not show the signature of the judge to the defendant.

The defendant appeared under the order, and the proceedings were thereupon adjourned till November 21, when defendant again appeared. On the first day of the hearing, and after the objections above had been made, the plaintiff made another affidavit, and obtained a second order for the defendant to appear before the same referee and be examined on the 11th of December, and this order was also served on defendant. Defendant appeared on that order before the referee but was informed that plaintiff had been there, had stayed a few minutes and had then left.

Subsequent to this the same judge made an order for defendant to show

cause why he should not be punished as for contempt for disobeying both these orders.

An order was made on the return of this order holding that defendant was in contempt for disobeying the first order, and that the issuing of the second order did not operate as a waiver or abandonment of the first order.

Risley & Stoddard, for applt.*Richardson & Adams*, for respt.

Held, When on the 31st of November, 1876, after the defendant had appeared before the referee appointed by the County Judge and objected by his counsel to the proceedings, and refused to be examined under the order of the 9th of November on the grounds then specified, the plaintiff did immediately and on the same day, on a new and original affidavit, apply to the same judge, who granted the former order of the 9th of November, and obtained a new order requiring the defendant to appear and be examined before a referee therein named, on the 11th of December thereafter, the said order of the 9th of November and all proceedings under the same should be considered as entirely abandoned and discontinued.

The plaintiff could not have two orders to the same effect running and in force at the same time, and the defendant could not be held to obey both orders.

The second order superseded the first, and it was therefore irregular afterwards to proceed to punish the defendant as for a contempt in not submitting to an examination under said order of the 9th of November. But as the order to show cause and the proceedings for the contempt were under both orders nominally, the defendant

might properly be held to obey the order of the 21st of November, the examination under the same having been suspended by the proceedings in bankruptcy.

The order appealed from, so far as it adjudges the defendant in contempt and imposes a fine upon him, should therefore be reversed, and so far as it directs him to appear before a referee to be examined and answer on oath concerning his property, should be affirmed, and the said defendant be required to appear before such referee at such time and place as shall be fixed for that purpose by the County Judge, making the said supplemental order without costs of appeal to either party.

Opinion by *E. D. Smith, J.*

MECHANICS' LIEN.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Miner v. Langan.

Decided May, 1876.

Under a mechanic's lien the owner is not obliged to pay any greater sum than he agreed to pay the contractor nor more than was unpaid at the time of filing the lien. Before foreclosure the claimant should be able to show the inability of the owner to perform his promise or put him in default by demanding performance.

Action to foreclose a lien of a sub-contractor.

The owner had made contracts with the contractor, and payment under them was to be made partly in money and partly in lime. The money had been paid. The lime had not been paid or demanded.

The owner testified he had always been ready to deliver the lime. The plaintiff had a verdict.

The owner appeals.

Lawton & Stebbins, for applt.

Wm. Lounsberry, for resp't.

Held, Under sections 2 and 3 of Laws of 1854, chap. 402, that where work is done or materials furnished on the credit of the contractor, the owner is not obliged to pay any greater sum than he agreed to pay the contractor nor more than was unpaid at the time of filing the lien.

If the contractor had no right of action, the mechanic had none, unless there was collusion between the owner and contractor. The defendant has never refused to deliver the lime nor has he ever been requested to. He has not then been made liable to pay money in its stead. 13 Johns. 56; 3 N. Y. 88.

Before the contractor proceeds to foreclose he should have taken care "to be able to prove the inability" of the defendant to deliver the lime, or to put him in default by demanding it. *Dowdney v. McCullum*, 59 N. Y. 367. And the sub-contractor is in no better position.

Judgment reversed with costs, and a new trial granted, costs to abide the event.

Opinion by *Learned, P. J.*; *Bocks and Boardman, J. J.*, concurring.

DISTRICT COURT OFFICERS.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Albert Goettman *resp't.* v. The Mayor, &c., of New York, *applt.*

Decided December 2, 1875.

New York City District Courts are not parts of the municipal government, and their officers are not included in the restrictive clause of the city charter, (sec. 114).

Appeal from judgment recovered on

demurrer to the answer of defendant.

Plaintiff sues to recover salary as interpreter of the 6th Judicial District Court of New York City for the month of January, 1875.

Defendants by answer set up, that during said month plaintiff held the position of inspector of elections, to which he had been appointed, and that by such appointment he had forfeited or vacated the position of interpreter, in accordance with sec. 114 of the city charter; which provides that any person who, holding office by election or appointment shall, during the term of said office accept or retain any civil office of honor, trust, or emolument under the United States, of the State, a seat in the legislature, or other office of the City of New York, shall be deemed thereby to have vacated every office held by him under the city government.

To the answer plaintiff demurred as constituting no defence.

Roscoe H. Channing, for respt.

D. J. Dean, for applt.

On appeal.

Held, That plaintiff, though properly an officer, was not a municipal officer, but of the court in which his services were to be rendered, which court was not a part of the chartered government of the city, nor included in either of its departments, as they were created and defined by law at the time of plaintiff's appointment, (Laws of 1872, chap. 335, 484, 491, § 2c).

The court was one of the district courts of the city, provided for and organized under other laws of the State, especially enacted for the purpose.

In a general sense they became a part of the local government, but not of that created for mere municipal purposes. And it was only offices held

under the municipal government of the city, which the charter provides should be vacated by the acceptance of another civil office.

Judgment affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring; *Brady, J.*, concurring on the ground that the position of inspector being compulsory and but for a short time, the charter evidently did not intend to include within its restriction offices which, by the law, the appointee is compelled to accept.

PRACTICE.

N. Y. COURT OF APPEALS.

Godfrey, applt. v. Moser respt.

Decided May 23, 1876.

Where the judgment is entered upon the report of a referee and the General Term has a right to review the facts, it is its duty to pass upon them from the evidence.

This action was brought to recover \$4,939.50 for services rendered by plaintiff as attorney for defendant.

The case was tried before a referee who reported in favor of the plaintiff. The General Term reversed the judgment, certifying that the order of reversal was made upon questions of fact as well as law.

Joseph R. Flanders and John A. Godfrey, for applt.

Wm. Fullerton, for respt.

Held, That this court occupied the same position as the General Term as to the facts as well as to the law.

That the rule that where there is any conflicting evidence to sustain a finding, it is error in the General Term to reverse the judgment, is not applicable in any case where that court has a right to review the facts. When such review is proper it is the duty of the appellate

court to pass on the facts from the evidence; and in this respect the duty is different from what it is in reviewing a judgment entered upon the verdict of a jury.

Judgment absolute against plaintiff on stipulation.

Per curiam opinion.

PRACTICE. NONSUIT. OBSTRUCTIONS.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

John Shubert, *applt.* v. Urban Shubert, *respt.*

Decided April, 1876.

To order a non suit on the opening of a case the court must be satisfied that the counsel stated no cause of action in his opening, providing same was fully proved.

Obstructions. Rule as to.

Appeal from judgment in County Court of Onondaga county.

Plaintiff and defendant own adjoining premises in Syracuse, N. Y.

Four years ago the defendant, then owning the premises now owned by both parties, conveyed by full covenant deed the house and premises to plaintiff which he has ever since owned and occupied.

All this time defendant has owned and occupied a large vacant lot adjoining the plaintiff's premises on the east, in the same condition as when the conveyance was made to the plaintiff. A low line fence has always separated these lots, which was and is located about three feet from plaintiff's house.

In the spring of 1875, defendant erected on the line, three feet from plaintiff's house, but on his own land, a high fence, which obstructed plaintiff's view, and was about 10 feet high.

At the end and top of this structure, the defendant nailed a long strip, and put on the end of the stick an old hat and placed it so that it extended over and on plaintiff's premises.

Defendant was also in the habit of dumping his ashes and slops close up to plaintiff's well, which had the effect on an imaginative person of rendering the water rather a disagreeable beverage.

Baldwin & Haire, for *applt.*

D. B. Keeler, for *respt.*

Held, We think the county judge erred in directing a non-suit upon the plaintiff's opening.

The decision must be deemed to cover the whole opening of the plaintiff's case by his counsel, and it must be held that he stated no cause of action in such opening, providing the same was fully proved.

The judge was right so far as relates to the erection of the fence. A man has a right to make any erections he pleases on his own land, and to extend such erection upwards as high as the act of man can build, provided he does not infringe any rights in respect to air and light or otherwise attached to the adjoining land by grant or prescription. But he has not a right to extend any part of such erections, or anything material attached thereto, over the soil of of the adjacent owner.

In this case the plaintiff stated in his opening that the defendant placed on his fence a long stick extending from the top over into the plaintiff's yard, and upon the end of the stick he nailed an old slouch hat which made a fine scare crow, &c.

This was a clear invasion of the plaintiff's lot and premises, and a clear trespass, for which the plaintiff was enti-

tled to maintain the action and recover such damages as a jury should think proper to impose for such a species of injury.

The judgment should be reversed, and a new trial granted with costs to abide the event.

Opinion by *E. Darwin Smith, J.*

CONSTRUCTION OF WILL. TITLE.

SUPREME COURT OF PENNSYLVANIA.

Anshutz v. Miller.

Decided February 25, 1876.

Where an estate is given to a person described by relation, either to the testator or to other devisees, on a contingency, a person in being at the time of making the will, to whom the description would apply on the happening of the contingency, is intended to be the devisee.

Error to the District Court of Philadelphia County.

Case stated in nature of special verdict.

John E. Rorer died in 1870, seized of the lands in question, having made the following will:

"PHILADELPHIA, Dec. 11, 1869.

"This is to certify this is my last will and testament, that I do most respectfully submit that the children of William, James, or Albert Rorer shall have no share or portion in my estate; and furthermore, I empower John P. Anshutz to settle my said estate; and I bequeath to the said John P. Anshutz all my right and title to my income from said estate, as long as he shall live, and after his death his widow is entitled to said income; after her death it shall be distributed to Annie M. Miller, daughter of John Miller, and should the wife of John Miller sur-

vive (Annie M. Miller) it shall go to her.

"JOHN E. RORER."

Louisa M. Anshutz, the wife of John P. Anshutz, was the daughter of John Miller and Annie M. Miller, the testator's sister, and still survived.

All the devisees named in the will joined in an agreement with the defendant to sell the lands in question to him in fee simple, and give him a good, sufficient, and marketable title.

Upon the tender of the deeds he refused to accept them, upon the ground that the devisees could not convey a good and sufficient marketable title in fee simple to the land.

Upon these facts the court below entered judgment for the defendant; from which judgment plaintiff took this writ of error.

It was claimed by defendant that the provision of the will created a contingent remainder in favor of the person, yet unascertained, who should happen to be his wife when Anshutz dies.

Held, That all the successive devisees, except the widow of Anshutz, were indicated with individual distinctness. There was no classification, and no directions, as to them, that the gift should be dependent upon any relations which they bore to the testator or to each other. Mrs. Anshutz was in full life when the will was made. Surviving her husband, she would be his widow. Where an estate is given to a person described by relation, either to the testator or to other devisees, on a contingency that may or may not happen, and a person is in being at the time of the execution of the will, to whom, on the happening of the contingency, the description would apply, it is a safe general rule to hold such person as intended to be the devisee. It is the manifest

intention of the testator to provide for individuals within the circle of his sister's family. The title which the plaintiffs offered to convey was "good and sufficient" under the terms of the agreement.

Held also, That while it is held that a title to be marketable must be not merely a good but an indubitable one, for other wise the purchaser would be buying a law suit (17 P. F. Smith, 436), the possibility is too remote in a case like this to raise any serious question. No rational apprehension of danger from litigation can arise. Three distinct contingencies must arise before any interest hostile to the plaintiff's can be asserted. First, the death of the present wife of Anshutz; second, his subsequent marriage; and, third, his own death in the lifetime of his last wife.

Judgment reversed, and judgment for plaintiffs on stipulation.

Opinion by Woodward, J.

PROMISSORY NOTE. SETTLEMENT.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Sherman, administratrix, &c., *applt.*,
v. Peter D. McIntyre, *respt.*

Decided April, 1876.

The giving of a promissory note by one person to another is presumptively a settlement of all demands between the parties.

This presumption may be repelled by evidence.

Appeal from judgment on report of referee.

This is an action brought to recover a note made by defendant, payable to plaintiff's decedent.

The note was for \$100 and interest, dated October 14, 1871, payable in

three months to the order of E. J. Sherman, and was given for the sole use and benefit of Morgan L. Birdsell.

The defendant sets up in his answer a counter claim of matters arising prior to the giving of the note in suit. There was judgment for defendant, and the referee held and decided that the giving of the note in suit raised no presumption that all prior dealings between the decedent and defendant had been settled.

S. N. Dada, for *applt.*

Howe & Rice, for *respt.*

Held, It is well settled in this state that proof of the giving of a promissory note by one person to another, nothing else appearing, is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker at the date of such note was indebted to the payee at such settlement to the amount of such note. (Lake v. Tyme, 6 N. Y. 461; De Trent v. Bloomingdale, 5 Denio, 304; Dutcher v. Potter, 63 Barb. 20.) But this is a mere *presumption* which may be repelled by proof of the consideration of such note, and the occasion for and circumstances attending the giving of the same.

The proofs given and received at the trial in explanation of the giving of the note in question in this action, as found by the referee, fully repel this presumption arising from the giving of said note, and show that it was a mere accommodation note, given by the defendant for the benefit of another person to whom plaintiff's intestate was not willing to lend the amount of money specified in said note without security, but agreed to do so upon the defendant's responsibility as endorser or otherwise. The decision and conclusion of

the referee on this point was clearly correct.

The referee finds that the defendant established a set-off exceeding the amount of said note, the particulars of which are fully stated in his report. Of these items of set-off, the referee finds the intestate was indebted to the defendant for the amount of a promissory note produced, and upon which there was due at the date the sum of \$70; and also that the said intestate was indebted to the defendant at the time of his death in the sum of \$160 for the board and care of the said intestate and his wife, besides some other items not in dispute.

The findings of the referee upon these items are not unwarranted by the evidence, or against the evidence. On the contrary, I do not see why his finding in respect to these items is not substantially correct, and why, in any aspect of the evidence, the defendant did not establish a set-off sufficient in amount to extinguish the plaintiff's demand upon said note; and as the referee finds that no judgment was claimed by the defendant, except the dismissal of the plaintiff's complaint, either in the pleadings or on the trial, and no other judgment was rendered, it would be superfluous for us to consider and discuss questions and exceptions relating to other items of claim made by the defendant on the trial, inasmuch as if the referee erred in his decision in respect of such items, the plaintiff was not injured by such error, and it would still be our duty to affirm said judgment. The judgment should therefore be affirmed with costs.

Judgment affirmed.

Opinion by *E. D. Smith, J.*

MECHANICS' LIEN.

N. Y. COURT OF APPEALS.

Jenks et al., *respts.*, v. Brown, impl'd, *applt.*

Decided May 30, 1876.

A cancellation of the contract by mutual consent by the parties to it cannot affect the rights of a third party to enforce his lien for materials furnished the contractor.

Where a mechanic's lien has attached, it cannot be affected by any arrangement thereafter entered into between the contractor and the owner of the building.

This action was to enforce a mechanics' lien for the price of materials furnished by plaintiffs to one P., a contractor, for repairing and altering a building, on land belonging to defendant, in Kings county. After plaintiffs had furnished the materials P. gave them an order on defendant, to be paid out of the third payment due upon the contract between him and defendant, and which was accepted by defendant. Subsequently, and before the third payment was due P. under the contract, it was cancelled. The evidence did not show how far the work was to be prosecuted, or when it was to be finished, or that P. was in default in the prosecution of it. It did not appear how much work he had done before he stopped. Upon the cancellation of the contract it was arranged that P. was to receive just the amount of the third payment. Plaintiffs' lien was filed January 5, 1874, and notice of it was served on defendant January 6th, and he then said that there was some arrangement "to cancel the contract." The instrument of cancellation was dated January 1, 1874, but there was no proof that it was executed on that day. At the close of the evidence defendant's counsel moved for

a nonsuit, on the ground that the order never became due, as the contract was never carried out. This motion was granted.

J. Albert Wilson, for respts.

Samuel Hand, for appls.

Held, error; that the evidence showed that the order did become due, as the third payment was earned at the time of cancellation, that this being so it did not matter that the contract was not fully completed; that the defendant could not complain of non-performance, the contract having been cancelled by mutual consent, and as far as appeared before there was any default on the part of P.; that this cancellation could not affect plaintiffs' rights to enforce his lien; that even if the date of the instrument of cancellation was any evidence against plaintiffs, it was not conclusive, and defendant's declaration when the notice of lien was served tended to show that it was executed after the filing and notice of lien. That plaintiffs' lien having attached it could not be affected by any arrangement between defendant and P. thereafter entered into.

Order of General Term, reversing judgment on nonsuit and granting new trial, affirmed.

Opinion by *Earl, J.*

PRACTICE. APPEAL.

N. Y. COURT OF APPEALS.

In re petition of Whittlesey.

Decided June 6, 1876.

An order reviving a special proceeding pending against a discharged trustee at the time of his death, against his executors, is not a final order affecting a substantial right, and is not appealable to the Court of Appeals.

This is an appeal from an order of

the General Term affirming an order of the Special Term, reviving a special proceeding instituted against a discharged trustee, and pending at his death, against his executors. In 1858, the court, upon the petition of the trustee, made an order discharging him from the trust, and relieving his sureties, and appointing a new trustee, it being made to appear that he had accounted for and paid over the trust fund in his hands to his successor in the trust. In 1872, the *cestui que trust* applied to the court for an order vacating the order made in 1858, and for other relief, upon allegations that that order was procured by imposition and fraud upon the court. The court ordered it to be referred to a referee, to take proof of the matters stated in the petition, and report the same with his opinion thereon to the court. The parties appeared and proceeded with the reference. Pending the proceedings the trustee died, and the Special Term made the order of revival.

Joshua M. Van Cott, for applt.

Samuel Hand, for respt.

Held, that the order was not a final order, affecting a substantial right, made in a special proceeding within the third subdivision of sec. 11 of the Code, but was an intermediate order, and so was not appealable to this court. The fourth subdivision relates to orders in actions, not in special proceedings.

Appeal dismissed.

Opinion by *Andrews, J.*

SALE. DELIVERY.

N. Y. SUPREME COURT. GEN'L TERM.
THIRD DEPARTMENT.

Dellon et al., respts. v. Stanton, applt.

Decided May, 1876.

An action may be sustained for the

price of goods, value over \$50, where the sale was by parol, no money paid at the time of sale, and the delivery made some time subsequent to the sale.

Action for goods sold.

The plaintiffs agreed to exchange furniture for lumber of defendant, who desired the furniture as a present to his grand daughter W. The furniture was charged to defendant. The account was over \$50. There was no written contract, no part of the purchase money was paid at the time, and no part delivered at the time of the bargain.

The referee found that the defendant authorized W. to accept and receive the furniture at any time she chose to get it. That W. did accept and receive it on the 30th of January, and the 6th of February, being about six weeks after the bargain, and that the defendant knew of the delivery in January before the delivery in February had taken place. That the defendant had repudiated his contract to pay in lumber.

A. P. Smith, for applt.

Waters & Eggleston, for respts.

Held, That although the value of the goods was more than \$50 and the contract by parol, yet the referee having found that the defendant authorized W to accept and receive the goods, and that she did accept and receive them, the action is sustained.

Besides, the defendant knew of the delivery while it was going on, and did not notify the plaintiffs of any objection.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.; Bockes, and Boardman, J.J.*, concurring.

TRUSTS. DEMURRER.

N. Y. SUPREME COURT. GEN'L TERM,
FIRST DEPARTMENT.

Newton W. Hoff, trustee, &c., *re-spt.* v. George B. Pentz, *applt.*

Decided May 26, 1876.

The court has authority to appoint a trustee of real estate in place of a deceased trustee, and an allegation that he was duly appointed by an order of the court is sufficient.

The money received for real property, held in trust, remains impressed with the trust.

Appeal from an order overruling a demurrer.

The complaint alleges that plaintiff was, by an order of the court, duly appointed to fill a vacancy caused by the death of one Baker, in the position of trustee of the estate of John Pentz, deceased. The complaint also alleged that he had duly qualified.

It further alleged that the estate of Pentz consisted of land in the city or New York, a portion of which had been taken by the city for street purposes, and the amount awarded therefor paid to the defendant who had been employed by Baker as an attorney to conduct the business; and that he had failed to pay over a large portion of the money.

Defendant demurred on three grounds:

1. Want of legal capacity to sue.
2. Several cases of action improperly joined.
3. Insufficient statement of facts to constitute a cause of action.

James A. Deering, for applt.

George Hill, for respt.

Held, That the allegations of appointment were sufficient under § 161 of the Code.

The complaint sufficiently alleged

that the real estate was held by Baker as a trustee, and it was not necessary to set out the provisions of the will under which it was so held.

The court had authority to appoint a trustee in place of the one deceased, and the real estate vested in him. 3 R. S., 5 Ed., 22 § 87.

The money received came directly out of, and was a substitute for, a part of the trust property, and was impressed with the trust existing in the property out of which it issued.

The order appealed from should be affirmed, and as the defendant does not appear to have any legal or equitable right to the money, it should not be accompanied with leave to answer over.

Opinion by *Daniels, J.; Davis, P. J. and Brady, J.*, concurring.

DEED. FRAUD IN DESCRIPTION.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Beardsley v. Duntley.

Decided May, 1876.

Where the vendor agrees to sell land and execute a deed, which he knows does not, and which he knows the vendee believes does convey the whole of the land, the vendor will be decreed to convey the residue.

Admissions of the vendor made subsequent to the execution of the deed are competent to show fraud in the description.

This action was brought to compel the execution of a deed. The plaintiff, by her husband, entered into oral negotiations for the purchase of a farm. Subsequently the defendant executed a contract with the husband, and next day a deed of the premises to the plaintiff. The plaintiff went into possession of all the premises, and cultivated

them. It was found that a portion was omitted in the deed, and that the plaintiff claimed to own that. On the trial the jury found that the plaintiff and her husband understood they were buying the whole, and that the defendant knew this, and that the portion omitted was through fraud by the defendant.

R. L. Hand, for applt.

Hale, Smith & Hale, for respt.

Held, That the jury were justified in finding fraud. It is ground for relief that the defendant agreed to sell the farm and executed a deed which he knew did not, and which he knew that the plaintiff and her husband believed did, convey the whole of the farm. The verbal negotiation was not within the statute of frauds. *Glass v. Hulbert*, 102 Mass. 24, disapproved. The plaintiff has paid the full price and taken possession. The evidence of the agent was not in conflict with the written contract. He might take a contract in his own name for his wife's benefit. Evidence of what the defendant told other persons after execution of the deed was competent as showing fraud in inserting a description conveying less than he agreed to convey.

Judgment affirmed.

Opinion by *Learned, P. J.; Boardman, J.*, concurring.

SPECIFIC PERFORMANCE. REAL ESTATE.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Knapp, respt., v. *Hungerford et al.*,
applts.

Decided April, 1876.

A parol agreement between an ancestor and a third person by which, for a consideration, the former agrees to

sell and convey certain real estate to the latter, when performed, binds the heirs of the vendor. Admissions of ancestor are admissible to establish such agreement.

Third party can protect his interest in equity, and compel heirs to convey to him their interests.

The heirs could not be compelled to take the house so built under such agreement, and pay for same; they could be compelled to convey same to such third party.

It is not admissible in an action of partition to try the legal title, but equitable claims may be determined in such actions.

Power of referee as to amendments.

Appeal from a judgment.

In May, 1872, one Thomas Knapp died, seized of a farm of land. He left surviving him six children, his only heirs at law.

Prior to his death Thomas agreed with one of his children (the plaintiff), that if he, plaintiff, would move on to Thomas' farm and take care of same, he, Thomas, would give him a deed of a certain piece of land. Pursuant to this agreement plaintiff did move on to the farm, and he built thereon a house on the lot designated by Thomas, at an expense of about \$400, and he lived on the property up to the time of Thomas' death.

This action is brought to obtain a partition of the farm, and in the event a sale is necessary, to have the amount expended in building the house charged on the proceeds and paid to plaintiff, in addition to his share of the proceeds as one of the heirs of his father.

On the trial before the referee, the plaintiff called two witnesses, who testified that prior to the time plaintiff built the house they had talked with Thomas, and he had told them that he had made the agreement substantially

as above stated. The agreement between plaintiff and his son was never reduced to writing.

Thomas was alive when the house was built by plaintiff.

• *Held*, That the evidence of the two witnesses on the trial, as to the agreement with Thomas was admissible, as it tends to prove the parol agreement between plaintiff and his father, by virtue of which he claims to be entitled to the land.

That a parol agreement between an ancestor and a third person by which the former, for a valid consideration, agrees to sell and convey land to the latter, when performed by the purchaser, binds the heirs of the vendor, and the admissions of the ancestor are competent evidence against them to establish such agreement. The agreement was supported by a valuable consideration to erect the building.

That the parol agreement being proved, the plaintiff, after he had erected the house, had an equitable interest in the land so agreed to be conveyed, and the heirs are bound to convey the same. That the referee could not compel the heirs to take the house and pay plaintiff the value thereof. Plaintiff was entitled to a specific performance of the agreement of the ancestor to give him the land. The risk of selling the house should not be thrown on the heirs.

That in actions for partition it is not admissible to try conflicting claims as to title, but equitable rights and claims may be determined in such an action.

On the trial the referee gave plaintiff leave to amend his complaint by bringing in new parties.

Held, That the referee has power to amend a complaint by striking out or inserting the name of a party upon such terms as he shall deem just.

That the amendment was properly allowed by the referee.

The judgment appealed from reversed in part and amended in part.

Opinion by *Mullin P. J.*

AGENTS. LIABILITY FOR ACTS. CHARGE.

N. Y. SUPREME COURT. GENERAL TERM
FOURTH DEPARTMENT.

Hiram F. Inglehart and John Wilson, Jr., *respts.*, v. The Thousand Island Hotel Co., *applt.*

Decided April, 1876.

It was a proper question for a jury whether the President and Secretary of a company, in purchasing goods, &c., acted individually or for the company.

The articles of incorporation of defendant are competent for the consideration of the jury.

Appeal from judgment at Jefferson County Circuit in favor of plaintiffs.

This action is brought to recover three accounts.

The defendant was incorporated April 28, 1873.

Plaintiffs sold groceries to Staples & Nott to the amount of \$600.

Staples & Nott, and their wives, were the sole officers and stockholders of said corporation.

Plaintiffs claim that said Staples & Nott were simply agents of said hotel company, and that the goods sold were used in said hotel.

On the trial defendant moved for a nonsuit, which was denied.

Anson B. Moore, for *applt.*

Bradley Winslow, for *respt.*

Held, The motion for a nonsuit was properly denied. It was proper to submit the question to the jury whether the goods purchased nominally by Staples & Nott after the incorporation of the defend-

ant were purchased on their own account or for the benefit of the defendant. Confessedly the hotel was erected and carried on by Staples & Nott. They were the President and Secretary of the defendant's company, and they and others were the Trustees and Stockholders of said company. The only men ostensibly connected with the management and control of said hotel and its affairs were said Staples & Nott, and it was a proper question and inquiry for the consideration of the jury in what capacity they were acting in that relation, whether individually or on behalf of the defendant. If, as officers or agents of the defendant, they were carrying on said hotel, the defendant was clearly liable for debts contracted by them for such purpose, as correctly held by the Circuit Judge, even though such debts were nominally contracted in their own names. The law on this point was correctly stated in his charge to the jury by the Circuit Judge. (Story on Agency, §§ 267, 419; *Baker v. Roberts*, 12 Wend. 413, 553; *Ferguson v. Hamilton*, 35 Barb. 427.)

If the goods are purchased by the agent in his own name the creditor may nevertheless hold the principal for the debt when discovered. (*Porter v. Talbot*, 1 Cowen, 359; *Fowler v. Pendergast*, 3 Hill, 72.)

None of the exceptions to the charge and to the refusals of the judge to charge as requested, we think, are well taken.

Upon the question whether the defendant was carrying on the hotel when the debts were contracted, it was not error to allow the jury to take into consideration, coupled with the other evidence in the cause, the fact that the articles of incorporation of the defendant specified that "The objects of

which the said company was formed were the business of erecting buildings for hotel purposes and keeping a hotel."

The judgment should be affirmed.

Opinion by *E. D. Smith, J.*

EVIDENCE. PRACTICE.

U. S. SUPREME COURT.

The First Unitarian Society of Chicago, *plff. in error*, v. H. Floyd Faulkner and George R. Clark, *defts. in error*. (October 1875.)

Declarations of a pastor are not competent evidence, unless he is shown to be the agent of the society, and that such declarations are within the scope of his agency.

The presiding judge may exercise his discretion as to the order in which the evidence may be given.

Courts of error have nothing to do with the verdict of a jury, except to ascertain if improper evidence was admitted to the jury, or whether they were misdirected by the judge.

In error to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought by plaintiffs below to recover \$4,530, for services rendered by them, as architects, in making plans and designs and drawing specifications, &c., for a church edifice for the defendants.

These plans were submitted by them at the request of defendants, in competition with other architects.

On the trial plaintiffs offered evidence tending to prove conversations between the pastor and plaintiff C., and of the action of plaintiffs in consequence thereof; and they also offered evidence tending to show statements and admissions of the pastor at a social meeting of the church, in relation to the employment of plaintiffs as architects by defendants.

To this defendants objected, on the ground that it had not been shown that the pastor was, in any sense, the agent of the defendants, or that he had any authority in relation to the employment of plaintiffs as architects.

The court admitted the evidence on the statement by plaintiffs that they expected to prove that the pastor acted as agent, and that the society acquiesced in his acts, and subject to the condition that they should subsequently prove that the party making the declarations was the agent of the society. No such evidence was introduced, but the case was given to the jury on the hypothesis that it was not proved that plaintiffs were the architects of the society.

A verdict was rendered for plaintiffs for \$3,862.50, which was afterwards reduced, and judgment entered for \$2,900, from which defendants bring this writ of error.

Held, That declarations of the pastor were not competent evidence unless it was proved that he was the agent of the society, and that the declarations or admissions were made in respect to matters within the scope of his agency.

Also held, That it was not absolutely necessary that the proof of the agency, in every such case, should be first introduced; that it is competent for the presiding judge, if in his judgment the ends of justice require it, to relax the rules of practice and to admit the evidence offered before the proper foundation is laid, if he is well assured by the party offering the evidence that the agency in question will be subsequently proved (14 Pet. 29; 14 Id. 63; 16 Id. 361; 5 Wall. 790; 4 Humph. 202; 3 Cush. 159; 9 G. & J. 477); that it was not error to admit the evidence, and that the evidence became immaterial in

view of the hypothesis adopted in submitting the case to the jury.

The building committee appointed by defendants, on examination of the several plans submitted to them, gave preference to the plan prepared by plaintiffs, and voted to adopt it, provided it be modified to meet their wishes and suggestions, that the contract for building should not exceed \$58,000, and that the action of the committee be ratified at a legal meeting of the society.

Alterations were made, and the society instructed the committee to adopt the first plan made by plaintiffs, provided the church could be built by that plan for \$58,000, all complete and satisfactory; if not, to adopt the plan of another architect. The church could not be built according to plaintiffs' plan for less than \$78,000, in consequence of which the society refused to build according to that plan.

The judge instructed the jury that if what the business partner did, after the qualified acceptance of the plan, was done under the same conditions under which the various competing plans were originally submitted, plaintiffs could not recover; nor could they recover on the theory that they were to have a reasonable compensation for their services if their plan was not ultimately accepted. He also instructed them that defendants were only liable for the acts of agents duly authorized, or for acts of persons subsequently ratified by the society.

After commenting fully upon the evidence, the judge said that the view previously presented was in no respect material, except so far as it bore on the question whether the business partner of plaintiffs was all the time performing service at his own expense, and with the understanding that if the plans

were ultimately rejected he was to receive no compensation.

The exceptions were very broad, and seemed to be directed more against the verdict than the instructions.

Held, That courts of error have nothing to do with the verdict of the jury, if it is general and in due form, except to ascertain, if they can, whether improper evidence was admitted to the jury, or whether the jury was misdirected by the judge; and that no error of the kind is shown in the record.

Judgment affirmed.

Opinion by *Clifford, J.*

FIRE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPT.

Edwin R. Brink and another, *respls.*
v. Hanover Fire Insurance Company,
applt.

Decided May 26, 1876.

In an action upon a policy of fire insurance no objection having been made to the proofs of loss either as to form, sufficiency, or time of service, but same having been retained, these facts operate as a complete waiver of all objections to the proof and of all other preliminaries.

Declarations of an agent of an insurance company of the result of his investigations, are admissible in an action upon the policy.

Appeal from judgment entered on verdict.

This was an action brought upon a policy of insurance issued by the Germania Fire Insurance Company, the Hanover Fire Insurance Company, the Niagara Fire Insurance Company, and the Republic Fire Insurance Company, all of the city of New York, and co-operating by the name of "The Underwriters' Agency," by which each insured one-fourth part of \$15,000 upon the

general stock of merchandise contained in the store of plaintiffs situate at Lexington, N. C.

This policy was countersigned by John G. Williams, the agent of The Underwriters Agency, at Raleigh, N. C., and from that place sent to the plaintiffs, who received it on the 25th day of November, 1865.

On the evening of the 23d of November, a fire, which destroyed the plaintiffs' stock of goods in part, occurred. The plaintiffs' account books were destroyed by the fire. Notice of the loss seems to have been given to the agent at Raleigh on the 25th of November, 1865, by letter.

One Brown was sent by the General Underwriters' Agency, three or four days after November 25, 1865, for the purpose of making examinations as to the origin of the fire and the extent of the plaintiffs' loss; and after making a thorough investigation of the case, he declared to the plaintiffs that there was fraud in the case, and that it was questionable whether they did not set the store on fire themselves. This declaration was admitted under objection and exception.

The plaintiffs, by their attorney, filed proofs of their loss with the defendant on the 16th of February, 1866, at the office of The Underwriters' Agency at the city of New York, and at the time the same were filed, Mr. Stoddart, the general agent, said to the attorney: "We don't owe you a single cent because the case is full of fraud. I refuse to pay you one cent."

In the examination of one of the plaintiffs as to the loss, a copy of a memorandum made by himself, was handed to him from which he gave testimony on the subject of such loss, us-

ing it as a memorandum. Afterwards the original of such copy was handed to the witness, and his evidence was repeated. In both instances this was done under objection and exception.

The judge charged the jury that if they found that the defendants, at any time, objected to the payment of the loss upon the ground of fraud, that it was not essential for the plaintiffs to serve proof of loss, and to this the defendant duly excepted; that if the defendants said that they would not pay this claim at all, that would be in law a waiver of the preliminaries, necessary to make them liable in the way of proofs of loss. To this part of the charge the defendants also excepted. The court also charged that if the defendants said they would not pay this claim because they were satisfied that a fraud had been perpetrated, that would be a waiver of the defense in the preliminary proofs of loss.

Hatch & MacDonald, for resp't.

Cetterill Bros., for applt.

Held, That upon the question of the giving of the notice of the loss there was abundance of evidence to go to the jury as to whether or not it was properly and sufficiently given.

Held further, That no objection having been made to the proof of loss, either as to form, sufficiency, or time of service, but same having been retained as it appears by the defendant's agent, these facts operate as a complete waiver of all objections to the proof and of all other preliminaries required on the part of the plaintiffs.

That the declarations of the agent who was sent to investigate the loss, were properly received. The statement which he made was simply a declaration of the result of his investigations,

and it should be regarded as part of the *res-gesta* in which he was engaged.

That with reference to the amount of loss plaintiffs gave the best evidence in their power in relation to the quantity of goods on hand at the time of the fire and the amount destroyed. If there was any error in allowing the use of the copy memorandum to refresh the witness' memory, that was abundantly cured by the production of the original, and the repetition of the evidence, as the memory of the witness was refreshed by that document.

As no substantial error was committed upon the trial, the judgment should be affirmed.

Opinion by *Davis, P. J.; Daniels, J.*, concurring.

MARINE INSURANCE.

N. Y. COURT OF APPEALS.

Sherwood et al., exrs., &c., *respts.* v. The Merchants Mutual Insurance Company, *applt.*

Decided May 30, 1876.

Where a policy of marine insurance, by its terms, provides that the risk is to terminate at the place and at the time the voyage shall be stopped, in consequence of ice or the closing of navigation making a completion of the voyage impossible, and allows three days for a discharge of the cargo, the insured has the right to make every effort to continue the voyage, after stoppage, to a proper place to discharge the cargo and lay up the boat for the winter, notwithstanding it is apparent it could not be finished by reason of obstruction by ice.

This was an action to recover on a policy of insurance upon certain property on a canal boat.

By the terms of the policy the risk was to terminate at the place and at

the time the voyage should be stopped, in consequence of ice or of the closing of navigation making a completion of the voyage impossible, allowing three days for a discharge of the cargo. It appeared that the boat proceeded on her voyage and reached the village of D. on the evening of November 28th or 30th (the evidence was conflicting as to which date). She was leaking badly and was put on a dry dock. On the next morning the leak stopped, and about 3 or 4 o'clock, P. M., she was taken off. When she went on the dry dock there was no ice. Ice formed on the 1st or 2d of December several inches thick. It was agreed between the captain of the boat and defendant's agent that a passage should be cut to get the boat down to a warehouse about 60 rods down the canal where she could be unloaded. A channel was cut 20 feet wide, and the boat started, but on the way she was struck by something, what it did not appear, a hole knocked in the bow and she sank.

The judge directed a verdict for the defendant.

Geo. B. Hibbard, for *applt.*

Jno. H. White, for *respts.*

Held, error. That the case should have been submitted to a jury.

Also held, That under the conditions of the policy the actual stoppage of the voyage was the time from which the three days for discharging of cargo were to be completed, and the insured had the right to make every effort to continue the voyage, notwithstanding it should be apparent that by reason of ice it could not be finished. He had also a right to continue the voyage notwithstanding obstructions by ice, to a proper place to discharge the cargo and lay up the boat for winter.

Judgment of General Term reversing order of Special Term denying a motion for new trial affirmed, and judgment absolute on stipulation for plaintiff.

Opinion by *Allen, J.*

SUBMISSION OF FACTS TO JURY. PRACTICE.

N. Y. COURT OF APPEALS.

Clemence, *respt.*, v. The City of Auburn, *applt.*

Decided June 6, 1876.

In an action to recover damages for an injury sustained by falling on a sidewalk, the questions whether the sidewalk was in an unsafe condition, and whether the injury was caused solely thereby, or whether negligence or want of care on the part of plaintiff contributed to it, should be submitted to the jury.

Where a party has been nonsuited, he may insist, upon appeal, not only that the judge erred in his application of the law to the facts, but that he erred in his conclusions of fact, or that there were disputed questions of fact that should have been submitted to the jury.

This action was brought by plaintiff against the City of Auburn to recover damages for an injury sustained by falling on the sidewalk in said city. It appeared that the Common Council of Auburn established a grade for a portion of the sidewalk in one of the streets, but where the new and old sidewalk joined there was a difference of several inches. By direction of one of the members of the Common Council the stone joining the new with the old sidewalk for a space of about four feet was laid at a grade and angle much sharper than that on either side. Plaintiff, when this place was covered with about an inch of snow, slipped thereon and

fell, and sustained the injury complained of. There was evidence tending to show that the sidewalk at this point was unsafe and insecure for persons passing over it, if their attention was not particularly called to it, that it had been suffered to remain in this condition for several years, and that casualties similar to that which befell plaintiff had happened on more than one occasion. Plaintiff was nonsuited on the ground that the Common Council in the performance of a "quasi judicial" act had established the grade, and that the sidewalk had been built in accordance with that grade, and the jury could not review the "judicial action" of the Common Council, who had a discretion in the matter, and that the city could not be held liable for the mistaken exercise of that discretion.

N. C. Monk, for applt.

F. D. Wright, for respt.

Held, error; that the case should have been submitted to the jury to determine whether the sidewalk was in proper repair and in a safe condition, and whether the injury to plaintiff was caused solely by such defect, or whether his own negligence and want of care contributed to it. That no question could be made as to the liability of the city for neglect of duty if the walk was in fact in an unsafe condition, and whether it was in such a condition was, upon the evidence, a proper question for the jury.

Where party is nonsuited upon the motion of his adversary, over his objection and exception, he may insist upon a review of the decision, not only that the judge at Circuit erred in the application of the law to the facts, as reviewed by him, but that he erred in his conclusions of fact, or that there were disputed questions of fact which

should have been submitted to the jury.

Order of General Term, granting a new trial, affirmed, and judgment absolute for plaintiff, on stipulation.

Opinion by *Allen, J.*

CREDITORS' BILL.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Ford, respt. v. Johnston, applt.

Decided April, 1876.

To set aside a conveyance for fraud, absolute, positive evidence of fraud is not necessary; the fraud may be inferred from all the facts.

A conveyance made pending an action for tort against the grantor with intent to defeat a recovery is fraudulent and void.

The fact that premises from the proceeds of the sale of which this property in suit was brought was declared a homestead, &c., did not exempt this land.

Appeal from judgment at circuit.

The defendant, R. N. Johnston and Cordelia Johnston are husband and wife. They were married prior to 1847, and in that year Cordelia received from her father about \$150, with which some land was purchased, and the land was under the Homestead Law declared a Homestead and recorded as such.

The husband occupied and improved this land; built thereon a house and barn, and paid up the mortgage.

In 1856, the said land was sold and conveyed for \$1100, and in 1857 100 acres of land was purchased for \$2,100, and the means realized from the sale of the first land was paid towards the \$2,100. The husband took a deed to this land in his own name, and gave a bond and mortgage back.

In 1863 fifty acres of the land was sold for \$1,600, and the money was giv-

en to the wife for safe keeping. She kept the same till 1864, when 100 acres was purchased and most of the \$600 was paid thereon and a conveyance of the new land was made to the husband, and the husband gave his bond and mortgage for the same.

In 1867 the last mentioned land was sold, and with the proceeds the land in suit was purchased and the husband took a deed in his own name and gave back a bond and mortgage, &c., &c.

In August, 1869 the plaintiff was assaulted by the defendant Richard N. (the husband), and in May, 1870, plaintiff recovered judgment against defendant Richard N., for damages for the assault, and execution was issued and returned unsatisfied.

About twelve days after the assault on plaintiff, defendant conveyed the premises to his son, and the son thereupon conveyed the same to the wife, Cordelia, and on the trial evidence of defendant's statements was given that he had put property out of his hands to provide against suit.

Plaintiff brings this action in the nature of a creditor's bill to set aside conveyance to Cordelia and have his judgment declared a lien, &c.

The value of the property so conveyed to Cordelia was \$3,000, and the court below held that Cordelia was only entitled to an equitable interest in the land for her \$150 and use of the same, and set aside the deed, and from that judgment this appeal is taken.

There was no consideration for the deed from Richard N. to his son or from Cordelia to the son. The action for the assault was commenced before the conveyance.

Walter L. Sessions, for respt.

Norris & Russell, for applt.

Held, That plaintiff's judgment having been recovered after the conveyance by Richard N., he was bound to show actual fraud. The evidence to establish fraud need not be absolutely positive; the fraud may be inferred from the facts in the case.

The conveyance having been made pending an action for a tort and with evidence of an intent that it was done to defeat a recovery is fraudulent and void.

The plaintiff's recovery is not affected by the fact that the proceeds of the property declared a homestead was put into property in suit. The husband's money and labor was after this spent on this property.

Judgment affirmed.

Opinion by *Noxon, J.*

BANK CHECKS. RIGHTS AND DUTIES OF HOLDERS.

U. S. CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN.

Farwell et al., v. Curtis.

The holder of a bank check must present and collect it the same day, or he is chargeable with laches.

He cannot extend the time for which the drawer is liable.

This was an action to recover the price of goods sold to defendant in 1875.

Defence, payment.

On the 5th day of April, 1875, defendant, a resident of New Lisbon, purchased goods of plaintiffs, in Chicago, and gave a check for \$800, on the Bank of New Lisbon, in payment. Plaintiffs on the same day sent the check by mail to the Bank of New Lisbon for collection. Said bank received the check on the morning of the 7th, paid the check out of defendant's funds on deposit, and sent a draft, by mail, to plaintiffs

for the amount of the check on the Union National Bank of Chicago. This draft was received on the 9th by plaintiffs, and deposited in the Bank of Montreal, in Chicago, for collection. The draft was presented to the Union National Bank for payment on the morning of the 10th, and not paid, whereupon plaintiffs notified the Bank of New Lisbon that the check would go to protest if not paid by Monday, the 12th. Not being paid at that time it was duly protested.

The Bank of New Lisbon could have paid the check in money at any time up to the 10th, but at the close of business on that day it stopped payment. At the time of sending the draft it had no money at the Union National Bank, nor authority to draw it without funds.

Held, That in these days, when such facilities are furnished by the express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object; that if the plaintiffs had sent the check by express on the last train on the 6th, they would have received the money on the 8th, and that, under these circumstances, to send by mail to the drawees, with instructions to collect and return, is hardly equivalent to a demand at the counter for payment; and that as plaintiffs adopted another course than the one which the exercise of ordinary care and diligence would have dictated, they should stand the loss which has resulted from it.

Also held, That plaintiffs were guilty of *laches* in not presenting the draft for payment before the 10th. The rule of commercial law is that in cases where the parties all reside in the same place, the check must be presented for pay-

ment before the close of business on the day following its date or delivery to the payee; and in cases where it is drawn upon a bank at another place, it must be sent, by the farthest, by the last mail on the next day after its receipt, and be presented by the party receiving it on the day following its receipt by him. 20 Wend. 192; Story on Promissory Notes, 493.

It was claimed that plaintiffs had time to present the draft, to see whether it would be paid, and that if not paid, they could then protest the check.

Held, That this is not the law. The holder of a check cannot in that way extend the time for which the drawer would be liable. The drawer had a right to have his check paid on the day presented, and it was the duty of the holder to see that it was so paid, or, if not, protested; and if the holder had accepted it in lieu of money, he must present and collect it the same day, or be chargeable with *laches*. He cannot, as in this case, keep it for three days, and look to the drawer for payment, as by so doing he would extend the drawer's liability beyond the time fixed by law. 7 M. & G. 1061; 43 N. Y. 171.

Judgment for defendant.

Opinion by *Hopkins, J.*

BANKRUPTCY. CONTEMPT OF COURT.

U. S. DISTRICT COURT, S. D. OF N. Y.

In the matter of Mary Irving and Benjamin Irving, bankrupts.

Decided June 21, 1876.

The filing of a petition in involuntary bankruptcy will not divest a State Court of jurisdiction over an action pending in such court for the foreclosure of a mortgage on property belonging to the bankrupt.

The mortgagor is not guilty of con-

tempt of court in selling the property of the bankrupt under a decree of the State Court for the foreclosure of the mortgage, which was entered before the adjudication of bankruptcy, nor in entering a judgment for deficiency on such sale.

This was a proceeding in involuntary bankruptcy to punish one Dingee for contempt of court in violating an injunction.

The creditors' petition was filed on the 5th of February, 1876, and an order to show cause issued returnable the 12th of February. At the same time an order was made under section 5824 of the Revised Statutes that an injunction issue to restrain the debtors and one Dingee "in the meantime, and until the hearing and decision of said petition, and until the further order of this court, from levying upon or making any transfer or disposition of the property of the debtors, not exempted by the bankruptcy act from the operation thereof, and from all interference therewith, except to preserve the same," and on the same day an injunction to that effect was issued. The order to show cause not having been served, a new one was issued returnable the 19th of February. The injunction was served on Dingee on the 14th of February. On the 19th an adjudication was made and an assignee appointed.

Dingee, prior to the service of the injunction, had commenced foreclosing two mortgages held by him on property owned by Mary Irving, one of the bankrupts, in the Supreme Court of the State of New York.

On the 12th of February a decree of foreclosure and sale was entered in the action of foreclosure, and on or about the 8th of March, subsequent to the

service of the injunction, the property was sold at public auction, pursuant to said decree, and purchased by Dingee for \$100, subject to a prior mortgage, and a judgment for \$22,115.42 deficiency was entered against said Mary Irving.

In all this he acted in good faith, under advice of counsel, and with no wilful intention to disobey the injunction.

On this state of facts the motion is made by the assignee to punish Dingee for a violation of the injunction.

F. Fellows, for motion.

Dexter A. Hawkins, opposed.

Held, That the injunction ceased to operate when the adjudication of bankruptcy was made on the 19th of February, 1876; that the words "in the meantime" cannot be construed to mean a time later than the time an adjudication of bankruptcy is made on the petition, if one is made; that the injunction in this case was limited to the time of the "hearing and decision on the said petition," and the adjudication was such decision; that the words "and until the further order of the court" in the injunction, cannot be so construed as to give it a duration beyond that authorized by section 5024, or beyond that distinctly implied by the words "until the hearing and decision on the said petition." *In re Moses*, 6 N. B. R. 181.

It was claimed that, independent of the injunction, the proceedings of Dingee were a contempt of this court because the petition in bankruptcy was filed on the 5th of February, 1876, and the decree of the State Court was not made until the 12th, and the adjudication of bankruptcy was made on the 19th of February, 1876, and the sale of

the property and the entry of the judgment for deficiency were made thereafter; that from the 5th of February all the property of the debtors was in the hands of this court, and that the issuing of the order to show cause was a sequestration of such property, conditional until the adjudication, absolute after that.

Held, That the principle that the court has the power to punish for contempt those who interfere with the property of a bankrupt, by selling it after the adjudication, has its limitations. In the case of *Eyster v. Gaff*, (13 N. B. R. 546; 2 N. Y. W. Dig. 75) it was held that an adjudication in bankruptcy did not divest a State Court of jurisdiction over a foreclosure suit against the bankrupts' property then pending before it. This being so, the mere filing of a petition in involuntary bankruptcy against the mortgagor does not divest such jurisdiction. In this case the decree of foreclosure was made before the adjudication of bankruptcy. The adjudication did not deprive the State Court of its jurisdiction, nor the mortgagee of his right to execute the decree by a sale of the property. The sale was made before the assignment to the assignee. There was no contempt of the authority of this court in executing the decree of sale so far as to sell the property and give a deed for it, in the absence of an injunction from this court, and that entering the judgment for deficiency was no violation of any injunction nor any interference with any of the property of such bankrupt Mary Irving, and therefore there was no contempt committed.

Proceedings for contempt dismissed, with costs to be paid by the assignee out of the funds of the bankrupt Mary Irving, in his hands.

Opinion, by *Blatchford, J.*

EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Francis J. Parker, *respt.* v. Jane W. McCunn, as ex'trix. and James M. Gano as ex'r. of John H. McCunn, *appls.*

Decided May 1st, 1876.

When a verdict is directed for plaintiff on the trial, it is unimportant to consider the exceptions to evidence if there be in fact such uncontradicted, and unexceptionable evidence, that it was the duty of the court to direct a verdict upon that alone.

Attorney for plaintiff has not, for that reason alone, such interest as would exclude his testimony as to admissions made by defendant's testator, under section 399 of the Code.

It is proper for the court to direct a verdict whenever a verdict contrary to such directions would be set aside as being against evidence.

Appeal from judgment entered on verdict directed by the court.

Action brought to recover moneys alleged to have been received by the defendants' testator. Answer set up substantially a general denial and counter claim.

As appeared from the evidence, the defendants' testator, who was an attorney-at-law, recovered a judgment for \$2,780.70 for plaintiffs as their attorney, in an action brought by Barnes et al., v. Willett, former sheriff of New York.

That the money was collected in said suit by defendants' testator, and this action is brought for its recovery by plaintiff as assignee of the claim from Barnes et al.

At the close of the evidence on both sides, the court directed a verdict for the plaintiff.

On the argument of the appeal the appellant's counsel urged that the court erred in allowing

1. The testimony of Mr. Bigelow, plaintiff's attorney, as to admissions and conversations with the deceased, John H. McCunn, during his life time.

2d. In allowing one of the witnesses for the plaintiff to refresh his memory and recollection by an inspection of the paper and by reference to the same, purporting to be the stenographer's minutes in a certain other suit entitled McCrery v. McCunn, without adequate or sufficient proof that they were the minutes of such reference, and also because such minutes or memorandum was not made by the said witness.

Albert Stickney, for *respt.*

John A. Goodlet, for *applt.*

Held, Of course it cannot be said that the jury were influenced by any evidence improperly received upon the trial, and it is not necessary to consider the exceptions to evidence if there be in fact such uncontradicted and unexceptionable evidence that it was the duty of the court to direct a verdict upon that alone, without respect to the evidence excepted to or in conflict.

That with reference to the testimony of Bigelow, the defendants wholly failed to show that he had any other interest in the case, or in the question involved in it, than that which pertains to every attorney who is prosecuting a suit on behalf of his client. There is nothing, therefore, in this point. Sec. 399 of the Code does not apply to such a case.

As the receipt of the money, by defendants' testator, was established by the testimony of two other witnesses, and there was sufficient uncontradicted evidence to justify the direction of the verdict for plaintiffs aside from that, it becomes unimportant to consider whether the court erred in allowing the wit-

ness Parsons to refresh his memory by the inspection of the minutes in the suit of *McCreery v. McCunn*. For, striking out the minutes altogether, and the use that was made of them for any purpose, there still remains such uncontradicted evidence in the case as required, we think, the judge to direct a verdict for the plaintiff.

It is proper for the court to direct a verdict whenever a verdict contrary to such direction would be set aside as being against evidence. *Stone v. Fowler*, 47 N. Y. 566.

The plaintiff clearly established his right to recover as assignee of the demand, and no good reason appears for interfering with the verdict.

The judgment must therefore be affirmed.

Opinion by *Davis, P. J.*; *Brady and Daniels, J.J.* concurring.

GIFT INTER VIVOS.

N. Y. SURROGATE'S COURT.

In the matter of the accounting of Catherine Ward, administratrix of Richard Ward, deceased.

Decided June 5, 1876.

A deposit of moneys in a savings bank in the joint names of husband and wife is not such a gift as will entitle the wife to hold the same on the husband's death, without proof of further delivery.

In the absence of such proof, the moneys belong to the estate of the deceased.

Objections to the final account of the administratrix on the ground that it does not embrace a deposit made by deceased in the Excelsior Savings Bank, amounting to \$3045.

The deceased, in his lifetime, deposited the said money in the bank in the name of "Richard or Kate Ward." He kept the pass-book and drew money

from the bank on several occasions, but the wife never drew any money until she came into possession of the pass-book on the death of her husband.

It is claimed by the administratrix, the wife, that the deposit of the money in the name of Richard or Kate Ward, is evidence of a gift of the fund to her.

Daniel T. Robertson, for claimants.

Man & Parsons, for admr'x.

Held, That the transaction lacks the essential features of a gift *inter vivos*, in which expressions of intention to make a gift, and an actual delivery of the subject thereof to the donee, must concur, (33 N. Y., 531; 55 Id. 624; 47 Barb., 370); that there was not such a parting with the possession or title to the money so deposited as to divest the deceased of all right to the money, which is an essential feature of a gift *inter vivos*; that the fact that it was deposited in his name as well as his wife's, is the highest evidence that he did not intend to part with his control of it, and that the most that can be said of the transaction is that he intended, under the rules of the bank, to enable his wife to draw the money if he were unable to do so, and in this she would act as his agent.

The fact that the book was never in the possession of the administratrix until after the death of intestate, fortifies me in the decision that the deposit of the money in the name of Richard or Kate Ward was not intended as a gift to the wife.

Opinion by *D. C. Calvin*, Surrogate.

CERTIORARI.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

The People ex rel. Mathew Lyon, *applt.*, v. William F. Smith and others,

Commissioners of the Police Department, *repts.*

Decided May 26, 1876.

The right to the writ of certiorari to remedy a private wrong, is lost, unless application is made for the writ within a reasonable time after the commission of the wrong complained of; and any laches must be satisfactorily explained.

The writ will not be granted after a lapse of more than three years from the commission of the act complained of.

Appeal from order denying motion for writ of certiorari to review proceedings by which relator was dismissed from the police of the city of New York.

The complaint against relator was for being off duty. The irregularity or wrong complained of was, that upon the relator's trial before but one of the Police Commissioners, the Commissioner refused to hear the testimony of witnesses in relator's defence, which witnesses were at relator's instance before the Commissioners ready to be sworn.

The dismissal of the relator took place on the 17th day of May, 1871, and his application for the writ of certiorari to review the proceedings on which it was directed was not made until the 22d of September, 1874.

H. M. Whitehead, for applt.

Chas. F. McLean, for respt.

Held, That the delay in making the application is so great as to justify the order made denying the application. (Elmendorf v. Mayor, &c., 25 Wend. 693; People v. Mayor, &c., 2 Hill 9.) The writ was applied for to redress a private injury, and for that reason these authorities are entitled to be accepted as controlling in the case.

The relator endeavored to excuse his delay, by showing that he had some reason to expect that the Board would reconsider the proceedings in which he was dismissed, and restore him to his position. But the long delay that intervened was not sufficiently accounted for by what was done for that purpose. A very short period of time diligently used, would have served to dissipate all doubt as to the probability of the success of those exertions.

After all proper indulgence for that purpose the delay was so great as to deprive the relator of all right to this writ.

The order should be affirmed with ten dollars costs, besides disbursements.

Opinion by *Daniels J.*; *Davis, P.J.*, concurring.

PRACTICE. APPEAL.

N. Y. COURT OF APPEALS.

The People *ex rel* Donovan, *appls.*
v. Conner, sheriff, &c., *respt.*

Decided April 4, 1876.

An order quashing a writ of habeas corpus can only be reviewed by an appeal from the order.

This was a motion to quash a writ of error brought to review an order of the General Term affirming an order of Special Term quashing a writ of *habeas corpus*.

J. F. Donovan, in person, for motion.

H. Edwin Leary, opposed.

Held, That the order quashing the writ of *habeas corpus* could only be reviewed by an appeal from the order; that a writ of error would not lie.

Motion granted.

Per curiam opinion.

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CONVEYANCE. CONSIDERATION.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.Frank Hale, receiver, &c., *respt.*, v.
George Stewart and Henry W. Hotchkiss, *appls.*

Decided April, 1876.

The fact that demands, in consideration of which a certain conveyance was made were stale, did not render the conveyance fraudulent and void as to creditors; the demands being bona fide.

Appeal by the defendants from a judgment entered at the Onondaga Special Term, in favor of the plaintiffs.

The action was brought for the purpose of having a deed from defendant Stewart to the defendant Hotchkiss declared fraudulent and void as to a judgment in favor of Fannie Niles, against the defendant Stewart. The plaintiff was appointed receiver in proceedings supplementary to execution, instituted in behalf of Mrs. Niles, under her judgment. The receiver was authorized to bring this action, and after issue joined the cause was tried at Special Term, and resulted in a judgment for the plaintiff against the defendants, whereby the deed was declared fraudulent and void as to the plaintiff, Mrs. Niles, and her judgment. The deed was set aside, and the judgment declared a lien upon the premises prior to the conveyance to defendant Hotchkiss. The court *held*, and *decided*, as questions of fact, that the defendant Stewart, for a long time prior and up to within a few days of the recovery of judgment, was the owner and in possession of real estate covered by the deed, subject to a

mortgage of \$200. That a few days before judgment was obtained, the defendant Stewart, for the purpose of defrauding Mrs. Niles, conspired with defendant Hotchkiss, who was his brother-in-law, to cheat and defraud Mrs. Niles, and hinder and delay her in the collection of her judgment; and for that purpose Stewart executed and delivered a deed of his real estate to Hotchkiss, with knowledge on his part of the fact that Stewart had no other property or means to pay the said judgment, and of his insolvency after the transfer. That the transfer was upon the pretended consideration of \$300, which was made up of stale demands and accounts, which were many years old, and some of which, according to defendant's testimony, accrued as far back as 1855, and some in 1861, 1862, 1865 and 1868, and that the conveyance to Hotchkiss was fraudulent and void as to Mrs. Niles.

Gilbert & Hancock, for respts.*Lansing & Lyman*, for applts.

Held, That the decision of the judge at Special Term was erroneous; that although the greater part of the debt from Stewart to Hotchkiss had existed for more than six years prior to the time of settlement, it by no means follows that the demands were stale within the rules governing courts of equity, so that the parties themselves could not forego the length of time. If the debt was *bona fide*, the debtor could waive his defense of the length of time, and the conveyance founded thereon was not fraudulent and void.

Judgment reversed.

Opinion by *Noxon, J.*

LIFE INSURANCE. EVIDENCE OF DEATH.

U. S. SUPREME COURT.

The Mutual Benefit Life Insurance Co., *plff. in error*, v. Hattie B. Tisdale, *deflt. in error*. (October, 1875.)

Letters of administration are not admissible to show the death of the assured, in a suit brought in an individual character.

In error to the Circuit Court of the United States for the District of Iowa.

This action was brought on a policy of insurance issued to Mrs. Tisdale upon the life of her husband.

Evidence was given on the trial tending to show the death of Mr. Tisdale, on the 24th of September, 1866. It consisted chiefly of his sudden and mysterious disappearance, under circumstances making probable his death by violence. It would seem from the charge of the judge that defendant gave evidence that he had been seen alive some months after the date of his supposed decease.

The plaintiff offered in evidence letters of administration upon the estate of her husband, issued to her by the County Court of Dubuque County. Defendant objected to the admission of this evidence. The objection was overruled, and the letters were read in evidence, to which defendant excepted.

The judge charged the jury as follows: "The real question is whether Edgar Tisdale was dead at the time of issuing the letters of administration. It is incumbent upon the plaintiff to prove that fact. She has shown as evidence of that fact letters of administration issued to her as administratrix by the probate judge. It is the duty of the court to instruct you that this makes a *prima facie* case for the plaintiff, and changes the burden of proof from the

plaintiff to the defendant. * * *

Without contradictory evidence, these (the letters of administration) give the plaintiff the right to recover." To the charge in this respect defendant excepted.

Judgment was entered for plaintiff, from which defendant brings this writ of error.

Held, error; that letters testamentary issued to an administrator by a probate court, as a general rule, are evidence only of their existence; that they prove that the authority incident to that office has been devolved upon the person therein named; that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life; that in an action by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. That if the present suit had been brought by plaintiff as executor or administrator to collect a debt due her deceased husband, or to establish a claim arising under his will, the letters testamentary would not only have been competent, but conclusive, evidence of her right to maintain the action, and unimpeachable except for fraud; but as the suit was brought by plaintiff as an individual, to recover a debt claimed to be due her as an individual, the books abound in cases which show that a judgment upon the precise point in controversy can not be given in evidence, in another suit, against one not a party or privy to the record.

Neither upon principle or authority was it proper, in the individual suit of Mrs. Tisdale against a stranger, to admit letters of administration upon the

estate of her husband as evidence of his death.

Judgment reversed, and new trial ordered.

Opinion by *Hunt, J.*

LIS PENDENS. MARRIED WOMAN.

N. Y. SUPREME COURT. GEN'L TERM.
THIRD DEPARTMENT.

Sanders, applt, v. Warner, respt.

Decided May, 1876.

A notice of Lis Pendens may properly be filed in an action to have a debt declared a lien upon the separate real estate of a married woman.

The husband of the defendant commenced an action against her in 1869, for money lent, and at the same time filed a *lis pendens*. He got judgment in 1873, and the debt was declared a lien against her real estate from the time of filing. The money lent was applied to the payment of mortgages on her separate estate. In 1870, she conveyed to plaintiff by warranty deed. This action was brought to restrain the sale of this real estate under the judgment, the plaintiff claiming that the filing of a *lis pendens* in such an action was a nullity; that the cause of action as stated in the complaint was not an action affecting the title to real property within Sec. 132 of the Code, and that he was a *bona fide* purchaser without notice. It was admitted that he had no notice beyond the constructive notice arising from the *lis pendens*. An injunction was granted in this action, but was vacated on the trial, and the complaint dismissed. The plaintiff appeals.

L. B. Kern, for applt.

M. F. Ufford, for respt.

Held, That the action was one af-

fecting the title to real property. The plaintiff, the *lis pendens* being filed, bought at his peril. The effect of the filing is to permit the judgment, if the court so adjudge, to have effect from the time of filing. And if the plaintiff succeed, the purchaser subsequent to the filing is just as much bound as the purchaser after judgment. In the present case the lien was adjudged to take effect from the day of filing.

Judgment affirmed with costs.

Opinion by *Learned, P. J.*

JURISDICTION. CONTEMPT OF COURT.

N. Y. COURT OF APPEALS.

The People ex. rel. Woolf, respt., v. Jacobs, applt.

Decided April 18, 1876.

In a proceeding to punish for a contempt of court in violating an injunction, the court has jurisdiction to ascertain and include the amount of the costs and expenses of the proceeding as a part of the fine, and if it includes items not properly allowable, it is an erroneous decision merely, and not an excess of jurisdiction, which will render the commitment void. It cannot be reviewed on habeas corpus.

Defendant was imprisoned under a commitment for a contempt of court, in violating an order of injunction. The warrant directed him to be detained for thirty days, and also until he should pay a fine of \$2,470.54, made up of three items; \$2,068.29, the value of property conveyed by defendant in violation of the injunction; \$252.25, the costs of reference, and \$150 counsel fees in the proceedings to punish for contempt. Defendant sued out a writ of *habeas corpus*, claiming a right to be discharged on the ground that it was

an error to include counsel fees, and these being included in the fine made the whole void.

C. Bainbridge Smith, for applt.

Samuel J. Crooks, for resp't.

Held, That the court had jurisdiction to ascertain the amount of costs and expenses, and to include them as part of the fine (2 R. S. 538 § 21), and if in determining the amount it included items not properly allowable it was an erroneous decision on a matter submitted to its judgment, not an excess of jurisdiction, and did not render the commitment void, nor could it be reviewed on *habeas corpus*. *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, distinguished.

Judgment of General Term, reversing order of Special Term, affirmed.

Opinion by *Rapallo, J.*

JUSTICE'S COURT. PLEADING. AMENDMENT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPARTMENT.

Leonard, applt., v. *Foster, resp't.*

Decided May, 1876.

An answer alleging that a note was of no legal force, held a sufficient allegation to justify the defendant in insisting upon his right to amend by pleading the statute of limitations.

Appeal from a judgment of the County Court, reversing a justice's judgment.

The action was on a note. The answer set up payment and that "the note is of no legal or binding force or validity, if it had not been paid eleven years ago." The note had been due sixteen years. The justice refused to allow the answer to be amended on the trial, to plead the statute of limitations. For this error the County Court revers-

ed the judgment. The plaintiff appeals.

Geo. W. Ray, for applt.

S. Holden, for resp't.

Held, That under the loose modes of pleading allowed in justices' courts, the answer sufficiently set up the statute to justify and require the amendment, if necessary. It can be seen that the defendant intended to rely on some defence which needed no other facts than those which appeared on the note. The reason why the note had no legal force, although not stated, was apparent to any one who read it.

Judgment of the County Court affirmed with costs.

Opinion by *Learned P.J.*

PRACTICE.

N. Y. COURT OF APPEALS.

Becker, applt., v. *Howard et al, resp'ts.*

Decided May 30, 1876.

A reargument will not be ordered to decide questions which may arise in other pending actions, when all the questions involved in the appeal have been passed upon on the former hearing.

This was a motion for the reargument of a case which was affirmed by this court, without a written opinion, on judgment of the court below. Upon the appeal but one question was involved or presented, which was discussed in the opinion of the General Term. The motion for a reargument was made with a view to a settlement of some question which may arise in other pending actions, in regard to the same property.

Geo. W. Cothran for the motion.

Held, That the court is compelled to decide questions as they arise, and hav-

ing decided the precise points presented, the motion for a reargument must be denied.

Per curiam opinion.

LEVY. ESTOPPEL.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Clark, *applt.*, v. Hodgkins, *respt.*

Decided April, 1876.

A sheriff may be estopped from setting up claims to property he has levied upon by execution, by his acts and declarations inconsistent with the levy.

Appeal from a judgment of non-suit against plaintiff at Circuit.

This action was brought to recover the value of certain oxen claimed to be the property of plaintiff.

In February, 1873, one R. was owner of said property, and on that day one L., a town collector, by virtue of a warrant, levied on and sold said property to one B.

B., after this, sold said property to plaintiff.

The defendant as his defense showed that he was a deputy sheriff, and that prior to the collector's levy he had made a levy on said property under several executions, and that he took said property from plaintiff as such deputy.

Plaintiff then proved that the deputy had helped post some of the notices of the collector's sale; was present at such sale and did not claim any levy on it, and other facts going to show an abandonment of his levy by the sheriff. This defendant denied.

The court refused to let the question go to the jury and non su ted plaintiff.

S. R. Pratt, for *applt.*

J. B. Emmes, for *respt.*

Held, That it was error to take the questions of fact from the jury. The facts were conflicting and should have been left to the jury.

That his acts and declarations, if the evidence as to them was believed by the jury, would have estopped the sheriff from setting up his claim to property he has levied upon, and would be an abandonment of his levy.

Judgment reversed.

Opinion by *Noxon, J.*

PROMISSORY NOTE. MORTGAGE.

SUPREME COURT OF MISSOURI.

Logan v. Smith et al. (May, 1876)

An endorsee of a note, who takes it as collateral security for a debt, created at the time, with no notice of any equities between the original parties, and relying on the note for security, is a bona fide holder for value.

A bona fide endorsee of a note acquires the same right in a mortgage given to secure it as the original payee would have had if no equities had existed against the note.

This was a proceeding to foreclose a mortgage.

On the 17th of January, 1870, the defendant Smith purchased of one Cowan the land described in the mortgage for the sum of \$3,000. He paid \$1,800 in cash and gave his note for the remaining \$1,200, payable on the 25th of December, 1870, and executed this mortgage as security for the payment of said note.

There was a prior mortgage, of which defendant Smith was ignorant at the time of purchase, which had been given by Cowan to secure the payment of two notes of \$770 each, part of the purchase money, which became due on March 1st and December 25th, 1870, respectively. Default was made in the

payment of the first note, and an agreement was made that Smith should raise \$500 and Cowan the balance necessary to pay off said note. Smith paid the \$500, which was credited on his note to Cowan, but Cowan failed to raise any money. Smith subsequently paid all of Cowan's notes, and had the mortgage satisfied of record.

On the 7th day of August, 1870, plaintiff loaned Cowan the sum of \$1,200 and took a note therefor, and also Smith's note as collateral security, Cowan having informed him that it was secured by the mortgage. The mortgage was never recorded or given to plaintiff, and was probably lost. Cowan soon after became insolvent. Smith was notified of the transfer of his note prior to his payments on the Cowan notes other than the \$500 above mentioned, and before his note became due.

There was no evidence given that plaintiff knew of any arrangement having been made that Smith should pay his debt to Cowan by paying Cowan's notes as aforesaid.

The Circuit Court rendered judgment for plaintiff on the note for the balance due and interest, and for foreclosure of the mortgage.

It is claimed that plaintiff was not entitled to judgment because he could not be regarded as a *bona fide* holder of the note, inasmuch as he took it as collateral security.

Held, That as plaintiff took the note as collateral security, not for a pre-existing debt, but for a debt created at the time, and on the faith thereof, with notice of no equities, he became a holder for value.

It is also claimed that plaintiff was not entitled to judgment because the mortgage was not negotiable, and the plaintiff could not acquire, by the sim-

ple transfer of the note, any greater right to enforce the mortgage security than Cowan had.

Held, That unless the mortgage has been separately extinguished, as by release, the transfer of the note carries the mortgage with it, as an incident. The mortgage itself is not a negotiable instrument, and cannot be transferred as such, but the endorsee of the note acquires a right in the security afforded by it, by reason of the stipulation contained in the mortgage itself. The plaintiff being unaffected by the agreement between Cowan and Smith, has the same rights in the mortgage which Cowan would have had at the date of transfer, if no such agreement had ever been made.

The plaintiff being a *bona fide* holder of the note, and as such entitled to the benefit of the mortgage given to secure it, the judgment of the Circuit Court is affirmed.

Opinion by *Hough, J.*; *Wagner, and Napton, J.J.*, concurring; *Sherwood, J.*, concurs in result.

FRAUDULENT CONVEYANCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

Niles, applt., v. Fish et al., respts.

Decided May, 1876.

Where the debts which are the consideration of alleged fraudulent conveyances are bona fide, very strong evidence will be required to show that the conveyances themselves are fraudulent.

Action by plaintiff, claiming to be a judgment-creditor of defendant, to set aside conveyances. The referee found for the defendant. The plaintiff appeals.

A. D. Knapp, for applt.

Bundy & Scramling, for resp't.

Held, It does not affirmatively appear that the plaintiff was a judgment creditor at the time of the execution of the alleged fraudulent mortgages. The referee has found that there was no fraud. The question is one of fact. The evidence seems to show that the debts were *bona fide*. If this is so, which does not seem to be contradicted, it would require very strong evidence to show that the mortgages given to secure them were fraudulent. There is no such evidence in this case.

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Bockes and Boardman, J. J.*, concurring.

BOARD OF HEALTH. DEMUR- RER.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Middleton Bell, applt., v. *The Mayor, &c.*, resp'ts.

Decided May 26, 1876.

The Board of Health is the successor of the City Inspector, and as such has control of all existing contracts made by him.

By section 5, act of 1874, the Board is made a necessary party in any action where any of its proceedings are called in question.

Appeal from order of Special Term overruling demurrer to parts of the answer.

In 1865 the city, through its inspector F. I. A. Boole, entered into a contract with one Daniel Gallagher, whereby the city agreed to furnish to the latter, all the night soil of said city for a period of ten years, at a stipulated price per annum. The contract passed by successive assignments to plaintiff.

This action is brought for a breach of said contract, plaintiff alleging that the city failed during the years 1873, and 1874, to fulfill its part of the agreement. The Board of Health was not, however, made a party defendant.

The sixth clause of the answer alleged, that by statutory enactments the Board of Health became the successor to the City Inspector; that said Board in 1873, passed the following resolution:

"Resolved, That the necessary arrangements be at once made to receive and take away the night soil, which the assignee, under the Gallagher contract, and James R. Dye, refused to provide a suitable place for and to receive," and that said resolution was passed because the plaintiff, or his assignee, had failed to keep their part of the contract, and had not provided suitable receptacles for said night soil.

The seventh clause set up that the Board of Health was a necessary party defendant to this action, and should have been made such.

To these two clauses, plaintiff demurred, which demurrer was overruled at Special Term, on the ground that under it the allegations mentioned in the clauses demurred to must be taken to be true, and if the contractor failed in the performance of his duty, it was proper for the Board of Health, in the hot weather of 1873, to take other measures for the removal of the night soil in question; and that by section 5, chapter 636 of the Laws of 1874, the Board of Health was made a necessary party defendant in any action where any of its ordinances or proceedings were called in question.

Thos. Hooker, for applt.

Wm. C. Whitney, for resp't.

On appeal held, That the reasons as-

signed at Special Term were sufficient to justify the order.

The Board of Health has succeeded to all the duties that pertained to the office of City Inspector, so far as they affect the subject matter of the contract sued on herein; that contract, and the acts necessary for its performance, have been, since the creation of the Board, under its jurisdiction and control; that Board saw fit to abrogate the contract, on the ground of plaintiff's failure to perform the same. This action of the Board is directly in question, for if they acted legally, and upon well founded grounds, their action will be a complete defense to so much of the complaint as seeks damage for alleged breaches subsequent thereto.

Section 5, act of 1874, is imperative, that the *Board of Health shall be a necessary party* in all cases within the section. This provision is *suigeneris* and novel in its character; but it is the law, and as such is to be respected and enforced.

Order affirmed with usual leave to amend.

Opinion by *Davis, P.J.; Daniels, J.*, concurring.

EVIDENCE.

N. Y. COURT OF APPEALS.

Wintingham, *applt.*, v. Dibble, assignee, &c., *respt.*

Decided June 6, 1876.

When a party testifies that he has paid the claim of a third person to other parties who had purchased it, it is not proper to ask such third person how much he received from such party.

Where the plaintiff belongs to the first class of preferred creditors, a question as to how much was paid upon claims in the second class is immaterial.

This action was brought against defendant as assignee to compel him to account and pay plaintiff a balance alleged to be due him. The sole question of fact litigated upon the trial was whether the claim had been paid, and upon this question the court found in favor of defendant. Plaintiff did not assail this finding, but seeks to have the judgment entered against him reversed on account of the exclusion of certain evidence offered by him upon the trial. One of plaintiff's witnesses, D., was asked, "did you ever receive from him (defendant) any amount whatever; if so, what amount?" This evidence was objected to and excluded. D. was a preferred creditor of defendant's assignors. Defendant had not testified that he had paid anything directly to D., but he had testified that he had paid D.'s claim to some persons who had purchased it or who represented him.

C. Bainbridge Smith, for *applt.*

James M. Smith, for *respt.*

Held, That the evidence was properly excluded, as it had no bearing upon the issue; also, that the question was not proper to discredit defendant.

It appeared that there were several classes of creditors provided for in the assignment, and defendant testified that he paid the first class (in which defendant was) in full, and made a dividend upon the second class. He was then asked what dividend he made upon the second class, and the question was excluded.

Held, No error; that the question was wholly immaterial, as plaintiff's claim had nothing to do with the second class, and how much was paid to that class could have no bearing upon the issue litigated.

Judgment of General Term, affirm-

ing judgment of Special Term in favor of defendant, affirmed.

Per curiam opinion.

PROMISSORY NOTE. INCEPTION.

N. Y. SUPREME COURT. GEN'L TERM.
FOURTH DEPARTMENT.

Sweet, *respt.* v. Chapman, *applt.*

Decided April, 1876.

The time when a note should have its inception is a question of fact for the jury under all the facts.

This action was brought on a promissory note.

One G. was the agent for an insurance company and had solicited defendant to insure, and had promised defendant that he would take his note for nine months, with interest, for the amount of the premiums.

Defendant made his note and gave it to G. with the understanding, as he claims, that the note was not to be valid or binding until he had received the policy, &c. G. on the contrary swears that the note was to be valid and binding when the defendant had passed the medical examination.

Defendant did pass the medical examination all right, and then G., without notice to defendant, sold the note, before due, to plaintiff for ten per cent. discount.

Plaintiff knew nothing of the transactions or agreements between defendant and G., and took the note *bona fide*.

On the trial the court ordered judgment for the plaintiff. Defendant asked to go to the jury on the question of usury, and when the note had its inception, which request the court refused.

R. H. Tyler, for *applt.*

Randall & Randall, for *respts.*

Held, That the question of inception, and as to the time the note became valid and binding, was a question of fact upon conflicting evidence and should have been submitted to the jury. It was the vital point in the case, and it was error to refuse to submit the same. The decision of the judge that because the plaintiff purchased the note before due and without knowledge, and paid a *bona fide* consideration therefor, the note was valid in plaintiff's hands, was enormous, and the error consisted in overlooking the time of inception.

As between defendant and G., they could agree that the note should have no vitality till the happening of a certain event. Benton v. Martin, 52 N. Y. 574.

That a note to be the subject of sale must be an existing, valid note, in the hands of the payee, and given for some actual consideration so that it can be enforced between the original parties and if not valid in the hands of the payee, cannot be rendered valid by a sale to a *bona fide* purchaser at a rate of interest exceeding seven per cent.

Judgment reversed.

Opinion by Noxon, J.

RECEIVER. RIGHTS OF CREDITORS.

N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.

A. T. Stewart *applt.* v. G. W. Beale, et. al., *respts.*

Decided May, 1876.

Where the appointment of a receiver has prevented a levy by a creditor, his rights will be protected and he will be permitted to show, without actual levy, that another creditor's security is void.

Action to foreclose a mortgage cover-

ing real and personal estate, but which had not been filed as a chattel mortgage before certain causes of action arose in favor of creditors. The creditors recovered judgment and issued execution. Prior to the commencement of this action another chattel mortgage had been given to one F., and default had been made thereon. Before the recovery of judgment by the creditors the plaintiff had had a receiver of the property of the mortgagor appointed, and the creditors could make no levy under their executions. They then put in a supplemental answer alleging a prior lien on the personal property by judgment and execution. They brought an action asking to have the mortgage declared void as to them in respect to the personal property. Thereupon the powers of the receiver were extended over the creditors' action, and by an order entered in both actions the receiver sold the personal property, paid the prior mortgage to F., which was not disputed, and deposited the balance subject to the order of the court. Both the mortgagee and the creditors claim the fund. On the trial the court held in favor of the creditors.

Henry E. Davies and Edward B. Hilton, for applt.

R. E. Andrews and J. A. Mapes, for resp't.

Held, That the mortgage was void as to the personal property as against creditors who became such before the filing of the mortgage. By the appointment of a receiver the plaintiff prevented a levy by the defendants (creditors) under their execution. Had no receiver been appointed the defendants could have levied on the property claimed by Stewart under his mortgage, on default made, and the question

of the validity of the mortgage could then have been tried. The mortgage to F. does not affect the decision because by the action of the court on behalf of all parties that had been redeemed, although the title may have been vested in F. on default. A Court of Equity, which has taken possession of property by a receiver, will protect the rights of creditors and will not, because there was no actual levy, deprive them of the right to show that another creditor's security is void.

Judgment affirmed with costs.

Opinion by *Learned, P. J.*

CERTIORARI.

N. Y. SUPREME COURT. GENERAL TERM
FIRST DEPARTMENT.

People *ex rel.*, George McLaughlin
v. The Fire Department of the City of
New York.

Decided May 1, 1876.

The discretion of heads of departments in the removal of subordinates by way of discipline, is limited to cases which are in violation of prescribed regulations.

Certiorari to the Board of Fire Commissioners.

Relator was foreman of Hook and Ladder Company No. 6, in the employment of the Fire Department.

On the 19th of October, 1874, a charge was preferred against him of "conduct prejudicial to good order." The specifications being that he "did obtain from Mr. Richard Baxter, on the 5th day of June, 1874, the sum of forty-five (45) dollars, payable in one month, up to date, no part of which has been paid.

The proof on the examination showed that the money had been borrowed for one Walker, who transferred the

draft, on which the loan was made, to Baxter. Relator was discharged from the department. Chap. 335 Laws of 1873, sec. 28, provides, that the heads of departments may remove all employees, officers, &c., in their departments. Sec. 77 provides, that the government and discipline of the Fire Department shall be such as the board may from time to time, by rules, regulations, and orders, prescribe. There does not appear to have been any rules or regulations prohibiting the borrowing of money on salary.

On appeal.

D. A. Levien, Jr., for relator.

D. J. Dean, for respt.

Held, That Sec. 77 of the Laws of 1873 is clearly a limit to the exercise of discretion conferred by Sec. 28, which otherwise is unlimited and absolute.

The government and discipline must be established by rules. The charge against relator, if true, would be one against discipline.

If the orders, rules, and regulations were prescribed and published, the officers of the departments would understand and be bound by them, unless they were unreasonable and void.

But in cases like this, we do not think that the power of removal rests wholly upon the mere discretion of the respondents, but rather upon a violation of some order, rule or regulation, but it does not appear that any such rule or regulation has been prescribed, and if it had, relator's dismissal was erroneous, because the charge as specified was not proved.

Judgment for respondents erroneous and must be reversed.

Opinion by *Brady, J.; Davis, P. J. and Daniels, J.*, concurring.

ESTOPPEL.

N. Y. SUPREME COURT, ALBANY CIRCUIT.

The People v. William C. Stephens Thomas Gale and others.

Decided June 19, 1876.

The judgment of a court of competent jurisdiction upon a question directly at issue between the parties, unless reversed, forever concludes and estops all parties to the action, and those in privity with them, from questioning its accuracy or justice in another action.

Where a contract has been obtained by fraud or an illegal combination, the party for whom the work is to be done cannot insist upon its performance, voluntarily and with full knowledge pay the stipulated price, and then in an action recover his damages.

Motion for non suit.

This action was commenced in March, 1873, to recover the damage which the plaintiffs have sustained by reason of a contract made between the State and the defendant, Stephens, dated the 31st day of December, 1866, whereby the latter undertook to keep section number one of the Erie canal in repair, as in the contract is particularly defined for the period of five years from the first day of January, 1867, for the price or sum of seventy thousand dollars per year, and also during the same period to dredge the Albany basin and remove and deposit the material excavated, likewise particularly described in said contract, for the sum of seventy cents per cubic yard. This contract, immediately upon its execution, was, with the consent of the State, assigned by the defendant, Stephens, to the defendant, Gale, who, as the complaint avers, "represented as well himself as the defendants, Belden and Denison * * * and that said Gale

and said Belden and Denison have performed said contract."

The fulfillment of the contract according to its terms is conceded, and no claim is made for damages founded upon an unfaithful, dishonest or improper compliance with the conditions of the agreement. On the contrary, the complaint shows that the alleged wrongful acts of the defendants, for which redress is sought, were anterior to the execution of the instrument, under which the work was performed. It is alleged that, on the 28th day of December, 1866, "the contracting board," which "was a board of public officers created by law, and consisting of the three canal commissioners of the State of New York, the State engineer and surveyor, and the auditor of the canal department," were, according to their advertisement, on that day to receive proposals to do the work, which was let, as before stated, to the defendant, Stephens, and performed, as also before stated, by the defendants, Gale, Belden and Denison. That in order to compel the plaintiffs to let the work at higher rates than it was reasonably worth, and above those which could have been obtained upon a fair competition, "the defendants combined, conspired and confederated together to deceive and defraud the plaintiffs," and to that end, before the bids were opened on that day, organized a meeting, at which the right or privilege of bidding for such work, and controlling all other bids, were sold at auction, by which certain of the defendants obtained the control of the bids. That such control having been obtained, some bids were withdrawn, others were made informal, other bidders were induced to withdraw, and by those means, in ignorance of the combina-

tion and conspiracy, the contracting board aforesaid were induced to accept a bid which was in the name of the defendant Stephens, and to award to him the contract. That also by these means, the officers of the State supposing that the terms of Stephens were the best to be obtained, a much larger price was paid for the work than it was reasonably worth, and thus the State was greatly damnified and injured by the payment of the excessive prices stipulated for in the agreement.

The trial, with a struck jury, was commenced April 3, 1876, and at the close of the plaintiff's evidence, and after some documentary testimony had been given by the defendants to enable them to present the questions involved therein, a motion was made in behalf of the defendants for a non-suit, upon substantially two grounds: First—That the plaintiffs are barred from maintaining this action by reason of a former judgment of this court rendered in one brought by these plaintiffs against two of these defendants, Stephens and Gale, on the 2d day of June, 1870. Second—That whatever conspiracy existed, the State, having (as is claimed the evidence fully established), with full knowledge thereof, insisted upon the performance of the contract, and having voluntarily, with complete information of every fact now relied upon as a ground of recovery, paid its money, is in no situation to recover damages for acts which itself directed, and which, by such direction, it determined should be incurred.

The prior suit, the judgment in which is pleaded as a bar to any recovery in this, was commenced in November, 1868. It was an action brought by the plaintiffs in this, The People of the State of New York, against two of the

present defendants, William C. Stephens, the original contractor, and Thomas Gale, the assignee, and one of the executors of such contract. The object of the action was to set aside the same agreement, which is the subject of controversy in this, on account of the identical alleged unlawful and illegal acts which are urged as the grounds of recovery in the present; and also to recover the damages which the State had sustained up to the time of bringing such action by reason of such contract and the execution thereof. The only difference between the two actions is, that when this suit was commenced the contract had been fully performed.

To the complaint in the former action a demurrer was interposed by the defendants, assigning three grounds, viz.: "First. That there is a defect of parties defendant, viz.: That the persons alleged to have combined and confederated with said defendants should have been named, and should have been made parties defendant. Second. That several causes of action have been improperly united. Third. That the complaint does not state facts sufficient to constitute a cause of action." This demurrer was argued at a special term of the supreme court held by Mr. Justice Miller in the city of Albany, on the second day of June, 1870. An order entered upon the same day recites and declares: "This action coming on for argument upon the demurrer therein to the plaintiff's complaint, and after hearing Sanford E. Church, of counsel for defendants, and Marshall B. Champlain, attorney-general for the people, it is ordered that judgment be given for defendants upon said demurrer, with leave to the plaintiffs to amend within twenty days, upon payment of costs."

After the decision in favor of the defendants upon such demurrer and the filing of the original order just given, and its entry upon the minutes of the court, no further proceedings were had in said action until the year 1872, when Mr. Barlow, who had succeeded Mr. Champlain as attorney-general of the State, appealed from such order to the general term of the Supreme Court. That appeal was, on affidavits duly served by defendants and on motion made in their behalf, on the seventh day of May, 1872, dismissed by the General Term. On appeal from such order of dismissal to the Court of Appeals, the action of the General Term was sustained, upon the ground that the parties to the action had agreed to be bound by the decision of the Special Term, and the plaintiffs had effectually waived all right to appeal. (See opinion of the Court of Appeals in 53 N. Y. 310, and also that of the present judge, delivered upon a motion made during the progress of this trial to set aside the judgment entered in the action.) After the decision of the Court of Appeals, and in March, 1876, a formal roll, containing all the proceedings, pleadings, and papers in the action, and ordering judgment in favor of the defendants upon the demurrer without costs (the right to costs having been waived upon the stipulation of the plaintiffs not to appeal from the order of the Special Term) was duly filed, and such judgment roll, and original order sustaining the demurrer, were in evidence upon the trial.

E. W. Paige and Matthew Hale, for plff.

Frank Hiscock, Wm. C. Ruzer and Henry Smith, for defts.

Held, The judgment of a court of

competent jurisdiction upon a question directly at issue between the parties, unless reversed, forever concludes and estops all parties to the action, and those in privity with them, from questioning its accuracy or justice in another action. (*Bouchaud v. Dias*, 3 Denio, 238; *Hunt v. Terrell*, 7 J. J. Marsh, 67; *Wilson v. Ray*, 24 Indiana, 156; *Ferguson v. Couster*, 8 Georgia, 524; *Gray v. Gray*, 34 Georgia, 499; *Perkins v. Moses*, 16 Ala., 17; *Robinson v. Howderd*, 5 Cal., 428; *City Bank v. Waldon*, 1 La., Ann. 4.

It is nevertheless urged that as the demurrer specified three grounds, judgment might have been given upon one or both of the first two, which did not meet the merits of the action, and not upon the third, which did, and therefore it does not appear that a court of competent jurisdiction has ever decided, in an action against these defendants, or any of them, that the alleged acts set out in the complaint afforded to the plaintiffs no ground of action upon the contract, nor redress and compensation for the damages which they have sustained in its performance or by its fulfillment.

Held, There was but a single demurrer, though it was based upon three grounds. It was, according to the order and judgment, "*the demurrer*" which came on for argument at the Special Term, and it was "*upon said demurrer*" that judgment in favor of the defendants was given. It was sustained not in part, but as a whole, and that could only be done by reaching a conclusion unfavorable to the plaintiffs upon every issue which it presented.

Held also, It is not necessary to prove that the affidavits, upon which the order of the General Term of this court dismissing the appeal from the

order sustaining the demurrer was made, showing as they do that the order was decisive of the merits, and forming part of the judgment roll in evidence, are evidence upon this trial to declare the point on which the decision turned. The order as it stands must be so construed, and we have therefore a former judgment of this court forever and irreversibly (all remedy by appeal being lost) establishing that as against the defendants Gale and Stephens, at least, the State has, upon the identical facts found, no cause of complaint whatsoever. Nor is the effect of the former judgment upon this action in any wise weakened by the consideration that additional and subsequently accruing damages are now also sought to be recovered. The right to them is urged upon the same grounds—the same alleged frauds, the same alleged conspiracy—and these are swept away. That upon which the cause of action depends has been adjudged to be insufficient, and as in *Bouchaud vs. Dias* (3 Denio, 238), which was precisely like this in the particular that other damages were sought than those involved in the first action in which the judgment on the demurrer was rendered, Judge Bronson truly said, so we may now say, "*The matter which the plaintiff now attempts to agitate now is res judicata.*" The estoppel in favor of Stephens and Gale is complete.

Held also, That the defendants Belden and Denison, being in privity with the defendant Gale, the estoppel in their favor is just as effectual as in favor of Gale, will not be denied. The rule as to an estoppel created by a judgment is scarcely ever stated without including privies as well as parties. If the State, by reason of the former adjudication, is concluded from maintaining the suit

against Gale, the right to sustain it against Belden and Denison will not be argued. It is claimed, however, that the former judgment affords no protection to the other defendants because a party may fail to recover against one wrong-doer and yet succeed as against others. This is undoubtedly true when a case turns upon evidence given. The proof may be sufficient to justify a recovery against one, but insufficient as to another.

All the acts of the defendants Gale and Stephens set out in the complaint in the former action, and which are identically the same with those contained in the complaint in the present, are charged as done in confederacy and combination with others, those others being the present defendants, not then sued, and it was of those acts then and now charged this court gravely and solemnly decided and adjudged in the language of the demurrer, that they were not "sufficient to constitute a cause of action."

When the act of the principal has been judicially declared to be no crime, the conviction of the accessory would be a legal impossibility; and so, when the former judgment requires us to hold that Stephens, Gale, Denison and Belden have done nothing which gives a cause of action to the state, we must necessarily be confined to the same rule when we judge of the same conduct and acts committed by others in their aid. The former judgment may have been erroneous, and might, perhaps, have been reversed. It stands, nevertheless, to-day, uttering the law, which must control our action in regard to all these parties. It is founded upon no technicality, no legal quibble, but rests upon the great conservative principle, that litigation must cease with an unrevers-

ed judgment. What that settles is forever settled. And when we remember that the state has, by its agent, duly authorized (*People v. Stephens and others*, 52 N. Y. 306, see 309, 310), agreed, for a consideration, to be bound by a judgment of this court, the estoppel of the judgment is supplemented by the agreement, public policy and good faith both concur in demanding that this present suit cannot, for this reason, be maintained.

The counsel for the people contended that, when a contract for work, labor and service had been procured by an illegal and unlawful combination to put up the price, the party for whom the work is done, can, with full knowledge of such combination, require and demand its performance, voluntarily and with full knowledge pay the stipulated price, and then in an action recover his damages; which, of course, is the difference between the price which the contract calls for and the sum for which it could have been let had such combination not existed.

Held, There is, however, a wide difference between the case even of an executory contract of sale, when there is an express contract that the goods shall be of a particular quality, and a contract for work and labor to be performed in the future, the sum agreed to be paid for which was founded upon the supposition that the offer of the labor was at the best price to be obtained after fair competition, when in fact it was at a price which had been fixed by an unlawful combination which prevented such competition. The ground of the recovery (if at all) is that when an article is delivered upon an executory contract, the buyer cannot always examine, and has, therefore the right to take the property and rely upon the

seller's contract to make good any deficiency. When the contract, however, relates to future services, and was secured by practices heretofore mentioned, the gravamen of the action is that the party making the contract has been deceived, and acts in ignorance of the combination. The complaint in the action on trial proceeds upon this theory. Whatever plausibility there may be in holding that a person may rely upon an express agreement to make good any deficiency in an article sold, that reasoning falls in its application to a question like that with which we are dealing. The unlawful combination only works injury when the party who directs the work is deceived into an acceptance of a proposal and acts upon it. It is the supposition that a price, which is the result of an advertisement for proposals, is the best to be obtained, and the deception which that imposes which gives the right to sue. When the party is not deceived, but enters into the agreement with perfect information that others are willing to take the work at a less price, he is not deceived.

The principle that a party cannot recover, who has not been deceived, in a case where fraud is the basis of the action, is too well settled, and rests too plainly in reason to be questioned. A party who is not deceived into an agreement to pay a large price for work by means of a conspiracy to obtain it has no redress. Neither has one any redress whatsoever, who makes it in ignorance of the fraud, but who compels its performance with full knowledge. The party guilty of the illegal act must proceed and perform according to his promise, and can interpose no objection—he is powerless. Under these circumstances the other compels him to

proceed, knowing every fact. The damages are not only avoidable, but they are compelled to be inflicted, and to permit a recovery would be very much like allowing a man to recover for a battery upon his person which he not only directed to be committed but which he actually compelled.

In addition, then, to the distinction heretofore pointed out between an action founded upon an executory contract of sale, or where there is a positive affirmation of a fact, and one like the present, based upon the consideration that the former rests upon an independent promise, and the latter upon an allegation that the plaintiff was deceived in entering into the contract by the supposition that the price was a fair one because fixed by honest competition, which must fail when the party is shown to know that his price is exorbitant, and that others will do it for less, there is another still more marked, which, though involved in the argument already made, should, perhaps, be separately and distinctly stated. In the case of an executory contract for the sale of goods which are to be of a certain quality, the buyer simply accepts as a *pro tanto* fulfilment what the seller in the professed execution thereof delivers, relying upon the promise to make good the deficiency. In neither is anything done which puts the buyer in the one instance, or the tenant in the other, in the position of ordering the further act which accomplishes the injury. In the one the party suffers loss from that which he never ordered, and against which he had made a positive agreement. In that for future work and labor, the price for which has been fixed by an unlaw-

ful combination, and which is known before the work is ordered to proceed, or compensation paid, the party so ordering and paying has been an active contributor to his own injury, and has himself winged the dart which inflicts the wound. In the one, the injury is complete by the voluntary act of the party in default, and the other the consummation of the injury is enforced by the party making the complaint. Between them there is no parallel, and no train of thought which demonstrates a plausible cause of action in the one can furnish any possible ground for the maintenance of the other.

If an agent be authorized to receive proposals and contract for work, does not this power necessarily carry with it the right to decide every question pertinent to the making thereof? It surely does, for the authority conferred upon an agent to do an act "is always construed to include all the necessary and usual means of executing it with effect." Story on Agency, Sec. 58. The party entrusted with such a power is chosen not because he is a machine, but a man, with eyes to see and judgment to exercise. When the question comes as to the propriety of making the agreement, his principal expects that he will consider every point bearing upon the expediency of the acts which he is to do. The right to consider and determine necessarily involves the power to bind the principal by the decision when made. Knowledge of the agent is knowledge of the principal, and the acts of the former, when in good faith, bind the latter. *Joslin v. Corvee*, 52 N. Y., 90; same case, 56 N. Y., 626.

The contracting board of the State had knowledge, before they executed the contract, that other parties were

willing to do the work at a price less than the Stephens' bid called for. The informal bids, rejected because they were informal but not required to be refused for that reason, so informed them. They also knew that the proposal was too high, for it was first rejected for that very reason, but subsequently it was accepted, and the contract signed.

In about a month after the contract was executed, the legislature of the State had knowledge sufficient to put them upon inquiry, and as early as January 31, 1867, a resolution organizing a committee of inquiry was introduced, and had passed both houses on February 7, 1867.

April 19, 1867, a joint resolution was adopted by the two legislative branches requiring the contractors to proceed in the execution of the contract, and directing that the "Canal Commissioner in charge of the eastern division discharge his duties."

As early as March 11, 1867, certainly, and perhaps before that, the canal board had accurate information of the alleged conspiracy, and the officers of the State ordered the work to proceed, and compelled its performance for the whole five years.

On January 1, 1868, the joint committee of the legislature made its report, and such report fully established every fact relied upon in this action. During the same session a law was passed (chap. 869, laws of 1868) authorizing the attorney-general to commence suit to annul the contract, among others, which is involved in this action.

By chapter 55 of the laws of 1870, the contracting board was abolished, but it declared that its abolition should not "invalidate the contracts heretofore made, or discharge any of the contractors from the duties and obligations

imposed by such contracts, or the said laws." By the same act the canal board was authorized, "whenever they shall deem it for the interests of the State, to cancel and annul any contract or contracts, for repairs of the canals heretofore made, by a resolution to be entered in the minutes of the said board."

With entire knowledge the work was executed. Year by year a report from the canal commissioner in charge declared the sum due the contractors. Appropriations to pay were regularly made by the legislature, and payments made by the officers who were charged with that duty. The proof conclusively establishes that when the contract was executed the contracting board was not deceived by the supposition that the accepted bid was the lowest price to be obtained after a fair competition; that the officers of the State in charge of the work, and its legislature when its performance was required were fully informed of the alleged fraud; that the law-making power of the State, with accurate and complete knowledge, affirmed the contract by express law, and year by year placed the money of the State in the hands of its officers to be paid thereupon; and that such money and every dollar of it has been paid, not only without any mistake of facts, but with full, complete and accurate information.

The contract has been signed, executed, and completed with full knowledge, and it would be preposterous to hold that when the State has for five long years, required every act to be done which has been done, that it can have any redress for action which it has itself compelled.

Opinion by *Westbrook, J.*

RECEIVERS. STRIKING OUT ANSWER.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

John M. Harlow, trustee, &c. v. Alvan S. Southworth, receiver, impleaded &c.

Decided May 26, 1876.

Receiver permitted to come into an action and serve an answer setting up his appointment, and forbidden to allege anything in hostility to plaintiff, may not afterwards amend such answer and allege other matters.

Appeal from an order striking out answer.

This action was brought by the plaintiff as trustee of the first mortgage bonds of the Bleecker Street and Fulton Ferry Railroad Company, to foreclose the first mortgage given by the road.

The defendant, Southworth, was in the above action, and also a second action, appointed receiver of the Bleecker Street and Fulton Ferry Railroad Company.

Upon his own application he was made a party defendant in the above suit. In the order making him such party, he was permitted within three days to put in an answer to the above entitled action, by which answer he might set up his appointment as Receiver, and submit his rights to the protection of the court; and it was further provided that said answer should not contain, or set up, any matter or averment, in hostility to the above named plaintiff, John M. Harlow, as trustee, &c., or any other matter than as aforesaid.

Within the time provided by the order the Receiver, Southworth, put in an answer setting up his appointment as Receiver, and asking the protection of

the court; and within twenty days after served an amended answer, setting up that a large portion of the bonds referred to in the complaint were void, fictitious, and fraudulent evidences of debt, &c., and asking an accounting touching such bonds, to the end that such bonds as had been fraudulently issued, without consideration, should be ordered to be delivered up and cancelled, and for other relief.

Upon the return of an order to show cause, such amended answer was stricken out, and the original answer directed to be and stand, as the answer herein, and from the order striking out the amended answer this appeal was taken.

Held, That the answer, so far as it alleges that some of the bonds are without consideration, sets up nothing in hostility to the trustee. It is his duty to see to it that no such bonds are paid out of the proceeds of his foreclosure. The order, under which the Receiver was permitted to come in, limits his answer to certain specified things. The object, doubtless, was to prevent delay in the suit which would be unnecessary, as the order of reference to take proof of the bonds will doubtless contain proper directions on the subject of any alleged invalid or fraudulent bonds, and the Receiver, and all other parties will be entitled to be heard as to the form of such order and before the referee.

Order affirmed.

Opinion by *Daniels, J.; Davis, P. J.*, concurring.

CREDITOR'S BILL. EVIDENCE.

N. Y. COURT OF APPEALS.

Stowell, *respt.*, v. Hazlett, et. al., *appls.*

Decided June 3, 1876.

A judgment recovered on notes given to settle an action, the issue in which was joined before the execution of the mortgage, held sufficient to show an indebtedness prior to the making of the mortgage.

Declarations of a party made before giving the mortgage are admissible as evidence against him.

The testimony of a defendant given on a former trial of the same action may be given in evidence against him.

Plaintiff brought action as assignee of certain judgments against defendant, H., after return of execution unsatisfied, to set aside a mortgage executed by the latter to defendant McI., as fraudulent against creditors. Defendants claimed that plaintiff could not recover, upon the following grounds among others: That there was no proof; that the judgments owned by him were recovered upon an indebtedness which existed before the making of the mortgage from H. to McI. It appeared that these judgments were recovered upon notes made by H. and others, and given to settle an action against them upon another note, made by H. and others, the issue in which was joined before the execution of the mortgage.

Geo. T. Spencer, for *appls.*

D. H. Bolles, for *respt.*

Held, That this evidence was sufficient to sustain a finding that the indebtedness to plaintiff existed before the making of the mortgage.

Defendants also claimed that the referee erred in receiving in evidence declarations of H. made before giving the mortgage. Plaintiff's counsel stated, when the evidence was offered, that he claimed the testimony only as evidence against H.

Held, That it was to be inferred that it was received and considered by the referee with that limit.

Defendants also claimed that it was error to receive in evidence the testimony of H. on another trial of this action offered by plaintiff. The counsel for both defendants objected generally to its reception.

Held, That the evidence was properly received as against defendant H., and the referee was right in overruling the objection which sought to exclude it entirely.

Judgment of General Term, affirming judgment in favor of plaintiff on report of referee, affirmed.

Opinion by *Folger, J.*

COUNSEL FEE. CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPT.

William Tracy et. al., *respts.*, v. William Watson, *applt.*

Decided May 26, 1876.

Where firm holds all earnings in common, it is enough interested in a contract of third party with a member of said firm, to bring an action in the firm name, to enforce said contract.

Where the written contract of parties is apparently incomplete, evidence may be given, showing the further stipulation entered into by them.

Appeal from judgment recovered on a verdict.

Plaintiffs compose the firm of Tracy & Tallmadge, attorneys.

In 1870 the defendant, who was the attorney in the suit of Lynch v. Lynch, retained Mr. Tracy as counsel, agreeing to pay him as counsel fee, one-third of what the said Watson should receive from his client as fee, and an agreement to that effect was drawn up and signed. Tracy argued a motion in the

case, and was prepared to try the cause when it should be reached. Before the cause was reached the defendant therein died, and the matter was finally settled by her heirs without further litigation. Watson received for his services \$2,125, of which, by the agreement, \$708.33 was to be paid Tracy. He paid him \$250, and asked to be allowed to retain the balance for a short time, when he would pay it also, but afterwards changing his mind he refused to pay the balance, and for said balance this action is brought.

Defendant resisted this action on the ground that he had made his agreement with Tracy alone and not with the firm, and that therefore the plaintiffs were improperly joined. That Tracy was to be paid for the trial of the case of Lynch v. Lynch, and there being no trial, the consideration failed. On the trial it was shown that all that was earned by either of the plaintiffs went into a common fund, and belonged to all alike. The written agreement was put in evidence, the part referring to counsel fee was as follows:

"He (Watson) employs Tracy, as counsel, and is to pay over to him one-third of what he shall derive from the service; not counting in \$400 received on account."

The court ruled out (Wm. Watson) defendant's parol evidence which tended to vary the terms, or to show the consideration of the written agreement, and directed a verdict for plaintiff.

On appeal.

Wm. Tracy, for *respt.*

Wm. Watson, for *applt.*

Held, That the members of plaintiff's firm having a common interest in the earnings of each member, were properly the parties in interest in this

case, and the action was correctly brought in their names. The contract was explicit and complete upon the subject of counsel fee, and for that reason it was not liable to be explained or changed by oral evidence. The parties had expressly stipulated how the amount realized from the litigation should be divided between them, and that was not rendered subject to any contingency, or qualification whatever. Where the instrument, produced as the contract of the parties, is apparently incomplete, then evidence may be given showing the additional stipulation entered into by them.

This was not such a case; the only question was as to the amount defendant should pay; and when it appeared what he had received, the contract fixed in plain terms what he should pay.

Judgment affirmed.

Opinion by *Daniels, J.*

Davis, P. J., and Brady, J. concurring.

PRINCIPAL AND AGENT.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Merchants' Bank, *applt. v. Hayes et al., respts.*

Decided April, 1876.

A promissory note given for work done for the principal by an agent having a power of attorney, and signed "J. E., attorney for the estate of L. Hayes," does not bind the heirs of the estate, (the principals).

Appeal from judgment of non-suit.

John Edwards is the attorney under a written power from the heirs, of the estate of L. Hayes, deceased.

By his power of attorney, Edwards was to take charge of and have a general superintendence, care and control over the property, real and personal, of

said estate; was to repair buildings, collect rents, borrow money and incur obligations in reference to such property, pay debts, &c.

Edwards employed one Wilson to perform certain work on the property of the estate and to pay for the work. Edwards gave to Wilson a note signed "John Edwards, attorney for the estate of L. Hayes." Plaintiff discounted this note, and brings this action to collect the same.

The heirs of the estate were sued, and they defend.

The Judge at Circuit non-suited plaintiff.

Winslow & Smith, for applt.

A. B. Moore, for respts.

Held, That the non-suit was right. That a principal is not bound by the contract of an agent unless the name of the principal is set forth in the contract or annexed to the signature of the agent, showing that it was the intention of the agent to contract for or in behalf of his principal. If the contract does not show this important fact, then the principal is not bound, but the agent may be personally responsible on the contract.

That the note in this case not disclosing or holding the principals, and being signed by *Edwards, attorney, &c.*, surely did not bind the heirs of the estate of L. Hayes.

Judgment affirmed.

Opinion by *Mullin, P. J.*

PUBLIC ADMINISTRATOR. INTEREST ON FUNDS.

N. Y. SUPREME COURT. GEN'L TERM,
FIRST DEPARTMENT.

Algernon S. Sullivan, public administrator, &c. *applt., v. Concepcion Herrera et al., respt.*

Decided May 26, 1876.

The interest on money deposited by the public administrator in bank, subject to the joint order of himself and the Comptroller, and which is paid by the bank, belongs to the lawful owners of the fund, not to the City.

The law relieving the city from paying interest after the money is deposited in the City Treasury, after the public administrator has settled his account, does not change the rule.

Appeal from the decree of the Surrogate of the County of New York, made upon the final settlement of the public administrator.

The public administrator received \$32,288. 48, belonging to an intestate, which was deposited, as the law requires, in a bank designated by the city, to the joint credit of himself and the Comptroller of the city of New York. While it remained on deposit interest was allowed on it to the amount of \$2,774.23. The heirs of the intestate sought to recover the amount of interest as a part of the funds.

Algernon S. Sullivan, in person.

Chas. H. Tweed, for Henera and others.

F. R. Coudert, for infants.

Held, That there is no statute authorizing it for the ground claimed by appellant, viz: That this interest belongs to the city, to recompense it for the care and preservation of the property, but that the rule of the common law prevails, and that the increase belongs, with the principal, to the beneficiaries.

The statute by express terms relieves the city from the payment of interest after the public administrator has settled his account, and paid the money into the City Treasury, to await its unknown owners. No such disposition had been made of the fund previous to its payment.

The interest previously accrued will therefore follow the principal, and form the proper subject of distribution.

The decree was right, and should be affirmed without costs.

Opinion by *Daniels, J.*; *Davis, P.J.*, and *Brady, J.* concurring.

EVIDENCE. EXPERTS.

N. Y. SUPREME COURT. GEN. TERM.
FOURTH DEPARTMENT.

Swartwout, respt. v. The N. Y. C. & H. R. R. Co., applt.

Decided April, 1876.

Evidence of experts is only necessary when the question at issue involves a peculiar science or skill. But where the question is one involving merely matters of common sense, evidence of experts is incompetent.

This was an appeal from a judgment in favor of defendant.

This action was brought for an injury to plaintiff's cattle, and on the trial the question arose as to the construction of a cattle-guard, and whether the construction was proper, and on the trial the question was asked by defendant's counsel, under objection, of one of its witnesses "whether the cattle-guard over which plaintiff's horse passed was a proper one."

Beardsley, Cunningham & Burdick, for applt.

Spriggs & Mathews, for respt.

Held, The question was incompetent. The question whether the cattle-guard was a proper one or not was not a question of skill merely.

Where the manner of its construction was shown, the jury was as competent to speak as any expert.

Whether a cattle-guard, so constructed as to allow the feet of cattle and horses to pass through, is properly con-

structed, can very well be determined by the jury.

Judgment reversed.

Opinion by *Mullin, P. J.*

CONSTRUCTION OF WILL.

N. Y. SUPREME COURT. GENERAL TERM.

FOURTH DEPARTMENT.

Ragan, *applt.*, v. Allen et al., *respts.*

Decided April, 1876.

Where by a will several legacies are left, and then the testator leaves all the rest, residue and remainder of the real and personal estate to other parties, without creating any express fund for payment of legacies, the real estate is charged with the legacies.

Appeal from judgment at Special Term.

A certain specific legacy was left by the testator to his wife to be in lieu of dower. The personal estate after payment of the debts was not sufficient to pay such legacy.

The will, after providing for the payment of the testator's debts, gives to the plaintiff (testator's wife), in lieu of dower, "the sum of \$2,000, to be held "by her, and for her use, comfort, support, and maintenance, to be invested "and controled during her natural life, "as she may desire, and to spend so "much of the principal and interest "thereof as may be needed for her support, comfort, and maintenance, and "after her decease to be divided between her two daughters and others." The will then gives three other legacies to different children. Then there was a clause as follows, viz:

"I give and bequeath all the rest, "residue, and remainder of all my real "and personal estate of every name "and kind soever, to my two daughters."

In a codicil to the will the said testator recites that he had given his said wife the sum of \$2,000 as above, and that he had also bequeathed "the remainder of his real and personal estate to others." No fund was designated by the testator out of which said legacies should be paid.

Geo. N. Smith, for *applt.*

C. D. Adams, for *respt.*

Held, That when a testator gives several express legacies, and then without creating any fund or trust for their payment, makes a general residuary disposition of the whole estate, blending the real and personal estate together in one fund, the real estate is to be charged with the legacies, upon the ground that in such case the rest, residue, and remainder can only mean what remains after satisfying the previous legacies. (Hill on Trustees, p. 360; Tiffany & Ballard, on Law of Trustees, p. 305, &c.)

Judgment reversed.

Opinion by *Smith, J.*; *Mullin, P. J.*, and *Noxon, J.*, concurring.

PROMISSORY NOTE. CONSIDERATION.

N. Y. COURT OF APPEALS.

Earl, *respt.*, v. Peck, administrator, &c., *applt.*

Decided April 11, 1876.

In an action on a note given by an intestate just before his death, mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to the note.

The court is not in error in refusing to leave to the jury, the question of the value of the services for which the note was given where the same were to be determined by the intestate, as that would be, in effect, to deprive the intestate of his power of determination.

This action was brought to recover \$1,000 and interest of a promissory note given by defendant's intestate to plaintiff, as alleged, for services rendered. The deceased was a physician and made the note after he had taken by mistake a fatal dose of aconite. He was conscious of his approaching death, which occurred about two hours after the note was made. Plaintiff had been housekeeper for the deceased, who was a bachelor, for seven or eight years, and he was indebted to her for her services, and the evidence intended to show that at some time during the service it was agreed that the amount of compensation should be left to the intestate.

H. M. Taylor, for applt.

Mr. Losey, for resp't.

Held, That mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, was not a defence to the note. That it is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred. If no part of the consideration is wanting at the time and no part of it subsequently failed, although inadequate in amount, the note is a valid obligation, while a want or failure of consideration; in whole or in part is a good defence to the whole note, or to the extent of such failure, (2 Hill 606; 21 Wend. 558; 42 N. Y. £62.

Upon the trial the court charged, in substance, that if the note was used as a mere subterfuge for a testamentary bequest plaintiff could not recover to the extent that it was so intended. Defendant's counsel then requested the court to instruct the jury that they might find what the real indebtedness ought to be and regard the balance as a bequest. This request was refused.

Held, No error; that the latter pro-

position would, in effect, have deprived the intestate of the power to determine the value of the services for himself, which he had a right to do.

Judgment of General Term, affirming judgment in favor of plaintiff, affirmed.

Opinion by *Church, Ch. J.*

EVIDENCE. OBJECTIONS.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Lyng, applt. v. Boyd, resp't.

Decided April, 1876.

For the reception of incompetent evidence which could not by any possibility harm any one, this court will not reverse a judgment.

Appeal from a judgment for defendant in County Court.

On the trial certain facts were proved by hearsay evidence under objection, but subsequently in the trial the same facts were proved by competent evidence.

There was a judgment in Justices Court for plaintiff.

The county judge reversed judgment on the ground of the admission of this evidence.

Scoville & Knapp, for applt.

C. S. Mereness, for resp't.

Held, That although the evidence was incompetent, the same facts having been proved by competent evidence during the trial, no one was injured by the reception of the evidence.

This court is required to give judgment according to the justice of the case without regard to the technical errors and defects which do not affect the merits.

Judgment of the County Court reversed, and that of Justice affirmed.

Opinion by *Mullin, P. J.*

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EVIDENCE. IMPEACHING
WITNESS.N. Y. SUPREME COURT. GEN'L. TERM,
FOURTH DEPARTMENT.John Gorgen, *respt.*, v. Jacob Balz-
houser et al., *appls.**Evidence, although admitted, will not be allowed to impeach a witness, unless some foundation is first laid for it, by calling the attention of the witness that is sought to be impeached to the time when and place where the conversation occurred that is introduced as impeaching testimony.*

The action is replevin for a quantity of brooms levied on by the defendant, Wright, a constable, on an execution against one Seely.

The issues were tried before a referee, who found for plaintiff. The defence was that the brooms were the property of one Seely, and taken on the execution against him in favor of the other defendant.

On the examination of a witness in the case, he was asked if he did not hear Seely say, at the time the replevin papers were drawn, that "he (Seely) had no interest in the brooms"

The evidence was objected to on the ground that it was improper and immaterial; that the declarations of Seely cannot be given in evidence against defendants when made to third parties. Seely, on the part of the defendants, had testified that he, and not the plaintiff, owned the property in question.

Held, That the evidence of the conversation was clearly incompetent to affect the rights of the parties to the action, but it was competent to impeach Seely if any foundation had been laid for it.

As evidence in chief no foundation was necessary, but as impeaching evidence it was necessary to call the attention of the witness to the time when and place where the conversation proposed to be proved occurred. As evidence upon the merits it was fatal to the defendant, and, to justify the court in holding that it was not so received, it should be clearly shown that it was received for the purpose of impeachment only.

Judgment reversed.

Opinion by *Mullin, P. J.*MORTGAGE FORECLOSURE.
SALE.N. Y. SUPREME COURT. GENERAL TERM.
THIRD DEPARTMENT.McDonald, *respt.*, v. Whitney, *applt.*
Decided May, 1876.*Where the mortgagor sells portions of the mortgaged premises, they will, on foreclosure, be sold in the order of their alienation. Grantvess will be protected only to the amount of purchase money paid by them. In such a case the release of one lot does not necessarily discharge the others.*

Appeal from a judgment in foreclosure, directing the order in which premises should be sold. The mortgagor divided the mortgaged premises into six lots and one half lot. He sold one to W. for \$700, on which \$145 had been paid. Subsequently he sold to H., the mortgagee releasing the property with knowledge of the sale to W., and applying part of the consideration on the mortgage. Afterwards lots were sold to McD., and a part was still unsold. The judgment directed the sale first of the part not conveyed; second, W.'s lot, out of the avails of which only the amount unpaid was to be ap-

plied, and then the lots of McD.. W. also had the privilege of avoiding the sale by payment of the amount due on his lot. W. appeals.

Held, That the provisions of the judgment were correct. The release of the lot sold to H. did not discharge W., nor must the whole consideration be credited on the mortgage. The principle is equitable, not legal. W. is entitled to be and is protected to the amount which he has paid. Nor should the lot of McD. be sold before that of W.. So far as W.'s purchase money remains unpaid, his lot should be sold first. (2 Paige, 300; 8 Paige, 361; 2 N. Y. 89.)

Judgment affirmed, with costs.

Opinion by *Learned, P. J.*; *Bockes* and *Boardman, JJ.*, concurring.

PRINCIPAL AND AGENT.

ENGLISH HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION.

Bower v. Peate.

Decided February 25, 1876.

Where one employs a contractor to rebuild his house, under an agreement that the contractor shall make good any damage to a neighboring house, and the contractor uses insufficient means to support said house, whereby it was damaged, the employer is liable.

Action for damages to plaintiff's house by the negligent excavation of ground adjacent thereto.

The plaintiff and defendant were owners and occupiers of two adjoining houses. Defendant employed a contractor to pull down and rebuild his house, making his foundations lower than those of plaintiff's house.

The contract provided that the contractor should take upon himself the risk and responsibility of shoring and

supporting, as far as was necessary, the adjoining buildings affected by the alteration, during the progress of the work, and make good any damage which might be sustained by any buildings during the progress of, or in consequence of, the alterations, and satisfy any claims for compensation arising therefrom which might be substantiated.

The contractor thereupon proceeded with the work, pulled down the house and excavated the soil to a lower depth than the foundation of plaintiff's house, and rebuilt defendant's house. But owing to defective underpinning or other support to the soil and walls, the plaintiff's house was damaged.

Verdict was rendered for plaintiff, with leave to move to enter the verdict for defendant, on the ground that defendant's contractor, and not defendant, was liable.

A rule having been obtained accordingly,

Held, That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise unless means to prevent them are adopted, is bound to see to the doing of that which will prevent the mischief, and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done, from which mischievous consequences will arise unless preventives are adopted. While it may be just to hold the party authorizing the work in the former case

exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose fault the omission to take the necessary measures for such precaution may arise.

In the present instance, preventive measures adequate to the occasion having failed to be provided, the removal of the soil was followed by actual damage to plaintiff's house, and the act of removal was therefore wrongful, as causing a wrong done to plaintiff. But the act of removal was an act done by the order and authority of defendant; was the act of defendant; and no man can get rid of liability for injury occasioned to another by a wrongful act, by seeking to throw the responsibility on an agent whom he employs to do the act. The agent may, no doubt, be responsible, but the responsibility of the principal is none the less.

Judgment should be for plaintiff, and the rule discharged.

Opinion by *Cockburn, C. J.*; *Mellor* and *Field, JJ.*, concurring.

RAILROAD COMPANY. DAMAGES.

N. Y. SUPREME COURT. GEN'L TERM.
FOURTH DEPARTMENT.

Zimmer, adin'r, *respt.*, v. N. Y. C. & H. R. R.R. Co., *appls.*

Decided April, 1876.

Liability for damages.

Evidence that defendant had been accustomed to keep a flagman at a crossing, although incompetent, must be objected to, or it can properly be considered by the jury.

Appeal from judgment and from order denying a new trial.

This action was brought for damages for an injury to plaintiff's son, which caused his death.

The place of the accident was in the city of Rochester, where the railroad track crosses Hudson street.

The engineer in charge of the locomotive causing the injury had just backed his engine from the turn-table and over switches situated just east of Hudson street, across said street, and having reached his proper track, had stopped and started forward, and was moving easterly, sitting on the right-hand side of his engine, and not in a position to see persons approaching to cross said track in Hudson st. He had with him on the the engine a fireman and brakeman. The question whether the bell was rung or not, whether plaintiff's son exercised a proper degree of care, and whether the engine was running at a proper rate of speed, were all questions of fact for the jury, as they were disputed.

There were some obstructions near the crossing which interrupted the view of any one approaching. The young man killed was driving a horse. He stopped a short distance before he reached the crossing, looked both ways, and listened, and saw nothing, and started on to the track. The engine had passed the crossing, had gone up about 300 feet, was switched on to another track, and started immediately back again, struck plaintiff's son and killed him.

On the trial evidence was received without objection that it was customary for defendant to keep a flagman at the Hudson Street crossing.

There was no flagman at the time of the accident.

Held, That the evidence warranted the finding of the jury; that a railroad company is bound to use more care and caution in crossing a street in a crowded city than in crossing a country road; that although the evidence of the custom of defendant to keep a flagman at the crossing was incompetent, it having been received without objection, was properly considered by the jury.

Opinion by *Smith, J.*

CONSTITUTIONAL LAW. BANKRUPT ACT OF 1873.

U. S. CIRCUIT COURT—NORTHERN DISTRICT OF GEORGIA.

In re Smith.

A bankrupt law which adopts the exemption from execution prescribed by the laws of the several States is uniform, and therefore constitutional, as far as such exemptions are concerned.

In passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law, and courts will not pronounce it unconstitutional unless its incompatibility is clear, decided and inevitable.

This is a petition filed to reverse a decree of the district court in bankruptcy.

John W. A. Smith was adjudged a bankrupt by the District court in the Northern District of Georgia, on the 3d day of June, A. D. 1873. At the date of the adjudication the petitioner was the judgment-creditor of the bankrupt in the sum of \$——. The judgment bore date prior to the 21st day of July, 1868, when the present constitution of Georgia went into effect, and was a lien upon the real estate of the bankrupt.

By an act passed prior to and in force in 1864, and in force when the

debt due to petitioner was contracted, and which remained in force until the adoption of the constitution of 1868, there was allowed to the head of a family, as a homestead, exempt from execution, fifty acres of land, and five acres for each of his children under sixteen years of age.

By the constitution of 1868, and by an act of the Legislature, passed October 3d, 1868, to carry the constitutional provision into effect, there was allowed to the head of a family a homestead of realty, exempt from execution, of the value of \$2,000 (in specie.)

The judgment of the petitioner against the bankrupt was duly proven and allowed as a debt against his estate prior to the 30th of June, 1874. On that day, the assignee in bankruptcy set off to the bankrupt his homestead, according to the provisions of the act of 1864, namely: ninety acres of land, that being fifty acres and five acres in addition thereto for each child of the bankrupt under sixteen years of age. The bankrupt claimed that he was entitled to have assigned to him the homestead allowed by the constitution of 1868, and the act of October 3d, 1868, to wit: realty to the value of \$2,000 (in specie.). He therefore filed with the register his objections to the assignment made by the assignee. The register referred the question thus raised with his opinion thereon, sustaining the objections of the bankrupt against the assignment, to the district judge, who also sustained the objections of the bankrupt, and held that he was entitled to have his homestead set off, under the provisions of the act of October 3d, 1868, notwithstanding the fact that the debt of the objecting creditor was contracted and the judgment therefor a lien upon the realty of the bank-

rupt, before the change in the homestead law.

To review and reverse this decree of the district judge, is the purpose of the petition.

Woods, Cir. J. The case turns upon the constitutionality of the act of Congress approved March 3, 1873, entitled

"An act to declare the true intent and meaning of the act approved June 8, 1872, amendatory of the general bankrupt law." 17 Statute, 577, Rev. Statute, section 4045. This statute enacts, "that the exemptions allowed the bankrupt * * * shall be the amount allowed by the constitution and laws of each State, respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decrees of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

To put the question clearly in view it must be stated that after the adoption of the constitution of 1868, and the passage of the act of October 3, 1868, to carry the exemptions provided for by the constitution into effect, the Supreme Court of Georgia at its January term, 1873, in the case of *Jones v. Brandon*, 42 Ga., 593, decided that the provisions of the constitution and of the law, as far as they increased the exemption of property from execution, as against debts contracted before their adoption, was in conflict with that provision of the United States which declares "No Stateshall * * pass * * any law impairing the obligation of contracts (Constitution of the U. S., Art.

1, Sec. 10), and were, therefore, null and void. The same decision had, in effect, been previously made by the Supreme Court of the United States in the case of *Gunn v. Barry*, 15 Wallace, 610. It follows from this state of the law, as declared by the courts, that when the assignee undertook to set off the homestead of the bankrupt on the 30th of June, 1873, he was not authorized to set apart, as against Whitefield's administrator, any greater amount of realty than was authorized by the act of 1864, except as he had derived his authority from the act of Congress of March 3, 1873, above cited. In other words, there was no valid and operative State law by which the bankrupt could claim that he was entitled to a homestead of the value of \$2,000 (in specie) as prescribed by the constitution and law of 1868.

The question, therefore, whether the act of Congress, March 3, 1873, is constitutional, is vital to the decision of this case.

The objection to this act is not that it impairs the obligation of contracts, for Congress is not prohibited by the constitution from passing such a law. *Evans v. Eaton*, Peters C. C., 328; *Sallerbe v. Matthewson*, 2 Peters, 330; *Bloomer v. Stalley*, 5 McLean, 158. Besides, the power expressly given to Congress "to establish uniform laws on the subject of bankruptcies throughout the United States," implies the power to impair the obligation of contracts. *Stephens v. Griswold*, Wall. 603; *The Legal Tender Cases*, 12 Wall. 457.

The ground of objection is that the law is not uniform as required by the constitution of the United States. In my judgment, a bankrupt law which adopts the exemption from execution prescribed by the laws of the several

States is uniform so far as such exemptions are concerned. The exemptions may differ widely in different States, but such an act would apply a uniform rule, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the laws of the State wherein he resided. Upon this ground the original provision of the bankrupt law, which adopted the State exemption laws in force in 1864, was declared to be uniform. *In re Beckertford*, 1 Dillon, 45.

But it is said that the act of 1873 does not adopt the exemption laws as they exist in the states, but gives effect to all those which were upon the statute books of the States in 1871, even though some of them may have been declared unconstitutional, invalid and inoperative by the State courts; that the operation of the act of Congress is therefore not uniform, because in some States the exemption allowed by the State laws is followed, while in others exemptions are permitted which the State laws, as interpreted by the courts, do not allow.

The same objection would apply to the original bankrupt act of 1867. That declared that the exemptions allowed by the State laws in force in 1864 should be allowed under the bankrupt act. The constitutionality of this provision has never been declared, and yet, before the 3d of March, 1867, the date of the bankrupt act, many of the States might have altered, amended or repealed the exemption laws which were in force in 1864. Doubtless many of them did so before the passage of the act of 1873. Yet the bankrupt act of 1867 undertook to give effect, not to the exemption laws as they existed at its passage, and as they might be thereafter altered or amended, but as

they existed in 1864. So, if the original act was uniform, the amendment of 1873 must be uniform.

Congress has undertaken to say that all exemptions in force at a certain date by laws of the State, shall have effect under the bankrupt act. I think this sufficiently meets the requirement of uniformity, and that to make the law uniform it was not necessary to enact that the bankrupt act should follow the shifting legislation of the States on the subject of exemptions, or the decisions of the State courts.

Thus the bankrupt act of 1867 continued the exemptions that were in force in Georgia in 1864, although those exemptions had been repealed and new ones established by the act of October 3, 1868.

Suppose the bankrupt act of 1867 had declared that all exemptions by the State law in force at the date of its passage should have effect under the bankrupt act. That would clearly be a uniform enactment. Would it cease to be such and become unconstitutional merely because the legislature of a State had, at a subsequent time, amended its exemption laws, or the courts of another State had declared its exemption laws unconstitutional? I think it would not. In other words, I think Congress may adopt the State laws on the statute books of the State, at a particular date, in reference to exemptions, and that the legislation is uniform, although the laws in some of the States may afterwards be repealed by the legislature or declared null by the courts.

I am advised that a different view of the subject has been taken by the United States Circuit Court for the Eastern District of Virginia, *in re Deckert* 1 American Law Times and Reports, 326, in which case the Chief

Justice of the Supreme Court pronounced the opinion. But, in passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law. While, therefore, disposed to yield great weight to this authority, I cannot forget that in the opinion of the Congress of the United States this law is constitutional, and that the highest judicial authority has said that the courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided and inevitable. *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat, 625; *Livingston v. Morse*, 7 Peters, 663.

While I admit that the argument against the constitutionality of this act is plausible and persuasive, yet I cannot say that it is entirely convincing; it does not make the unconstitutionality of the act clear, decided and inevitable.

Resolving doubts, therefore, in favor of the law, I must decline to declare it unconstitutional, and I must affirm the decree of the district court.

PARTNERSHIP.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Whittemore, *respt.*, v. Elliot et al.,
appls.

Decided April, 1876.

Partnership debts must be first paid out of partnership property, and when creditors obtain judgment against one member of a firm, and judgment is rendered against the creditor, in favor of other members of the firm on ground of infancy, such creditor is still entitled to be paid out of partnership property.

Appeal from an order.

Elliot, Trowbridge & Jennings were

co-partners, doing business in Oswego.

The firm failed and plaintiff sued for an account against said firm.

Plaintiff obtained judgment against Elliot, but judgment was rendered against him in favor of Trowbridge & Jennings, on the ground of their infancy.

The concern after this went into the hands of a receiver.

Plaintiff's claim against the partnership property was contested on the ground that having obtained judgment against only one member of the firm, his judgment was not against the firm, and he could only look to the individual property of Elliot.

The Special Term took this view of the case, and made an order that the judgment of plaintiff, in which case judgments were also rendered in favor of Trowbridge & Jennings, on the ground of infancy, be considered the individual debt of Elliot.

Held, That partnership property must be applied to the payment of partnership debts; that when the minors succeeded in establishing their defense they relieved themselves and their individual property from the judgment of such debts, but the adult partner, and the partnership property remained liable for such debts. As the avails in the hands of the receiver are from personal property, creditors are to share in such funds *pro rata*, and not according the date of their judgment, as if it arose from the sale of real estate. Until T. & J. were released from the partnership agreement their interest in the property was in equity chargeable with the partnership debts.

Order reversed.

Opinion by *Mullin, P. J.*

AGREEMENT IN FRAUD OF CREDITORS.

ENGLISH HIGH COURT OF JUSTICE. COMMON PLEAS DIVISION.

Blacklock v. Dobie et al.

Decided April 26, 1876.

An agreement whereby, in consideration of an assignment by a debtor of all his estate to two of his creditors as trustees for the benefit of all the creditors, they agree, upon realization of the estate, to pay the debtor £50, made without the consent of the other creditors, is illegal as a fraud on their rights.

Action for breach of an agreement.

The plaintiff entered into an agreement with defendants, two of his creditors, whereby he agreed to execute to them, as trustees for his creditors, an assignment of all his estate and effects upon trust for the equal benefit of all his creditors, and to make to them a full disclosure of all his estate and effects, and the defendants agreed that upon realization of his said estate and effects, they would return and pay to plaintiff the sum of fifty pounds.

The plaintiff performed his part of the agreement, but defendants failed to pay the fifty pounds, whereupon defendant brought this action.

At the trial a verdict was given for plaintiff.

A rule was granted to arrest the judgment on the ground that the agreement set out in the declaration was illegal, immoral, and contrary to the policy of the bankrupt law.

Held, That the agreement was a fraud on the creditors under the bankrupt laws. It appears on the face of the agreement that the realization of the whole of the estate was necessary in order to defray the plaintiff's debt, and yet it stipulates for the return of

fifty pounds to plaintiff by the trustees as a consideration for giving up the estate. The declaration is bad, and the judgment must be arrested.

Rule absolute.

Opinion by *Coleridge, C. J.*; *Brett and Lindley, J.J.*, concurring.

WARRANTY. PRACTICE.

N. Y. COURT OF APPEALS.

Dounce, *respt.*, v. Dow et al. *appls.*

Decided March 21, 1876.

When a party uses a large portion of goods sold to him, after an opportunity to examine them, he must be deemed to have accepted them, and to have waived any implied warranty.

A statement made by a party a year before the sale that he was receiving "xx pipe iron," which was tough and soft, is not a warranty that all the iron of that brand which he might thereafter sell was of that character.

When a party requests certain specified questions, for which there is no valid ground, to be submitted to the jury, it is to be assumed that he intends to waive the submission of other questions.

This action was brought upon a promissory note given by defendants to plaintiff, for a quantity of iron. It appeared that defendants, who were manufacturers of agricultural implements, applied to plaintiff, a dealer in iron, for ten tons of "xx pipe iron," and the latter procured the same for them, and received as pay the note in suit. Defendants, without testing the iron, mixed five tons of it with other iron, and used it in making castings, which, on account of this iron, were found to be worthless. Both parties supposed that the iron was first quality for the purpose for which it was intended. There was some slight evidence tending to show that the iron delivered was not

"xx pipe iron." Defendant's counsel requested certain questions, not including this, to be submitted to the jury. The court refused, and directed a verdict for plaintiff.

J. B. Adams, for applts.

J. R. Ward, for respt.

Held, That in the absence of fraud, plaintiff was only bound by his contract, which was to deliver "xx pipe iron"; that an implied warranty that the iron was merchantable could not be affirmed unless the contract was executory; that defendants, by using a large portion of the iron, after an opportunity to examine and ascertain whether it was merchantable, must be deemed to have accepted it, and to have waived any implied warranty.

Also held, That it must be assumed that when a party requests that certain specified questions be submitted to the jury, for which there is no valid ground, that he intends to waive the submission of other questions, and that therefore the submission of the question as to whether the iron delivered was that contracted for was waived.

Also held, That a statement made a year before the sale by plaintiff, that he was receiving "xx pipe iron," which was tough and soft, would not enure as a warranty that all the iron of that brand he might thereafter sell was of that quality.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Church, Ch. J.*

EVIDENCE.

N. Y. COURT OF APPEALS.

Richard, applt., v. *Wellington et al.*,
respts.

Decided June 6, 1876.

In an action for an alleged conversion of goods, where the defence is a sale of said goods, and defendants rely upon a letter of plaintiff in relation thereto, containing the words:—

"By amounts received on account, \$32,372.63," evidence tending to show that this sum was an indebtedness of plaintiff to defendants in other transactions, which he was willing to apply in payment for the goods, is material and admissible, as it would destroy the effect of the acknowledgment in the letter as an admission of a consummated sale, and the receipt of payments on account.

This action was brought to recover for the alleged conversion of a quantity of wine belonging to plaintiff, who was an importer of wines. It appeared that a portion of the wine was stored with defendants, who kept a bonded warehouse, for safe keeping, a part in August, 1866, and a part in November, 1868, upon the representation that they would probably purchase it. In February, 1870, plaintiff sent defendants bills of the two lots, dated as of the time when the wines were delivered, for the purpose of bringing them to a determination whether they would purchase or not. These bills were not agreed to by defendants. In November, 1870, defendants failed, before having agreed upon the price and terms of sale, and having in the meantime sold the wine. Defendants introduced in evidence a letter from plaintiff, which contained these words:—
"By amounts received on account, \$32,272.63." Plaintiff offered to explain this credit, and testified that it alluded to note transactions between him and defendants, and offered evidence as to what those transactions were, and of the facts upon which the credit was based; in substance offering to show that this sum was an indebted-

ness of plaintiff to defendants upon other transactions which he was willing to apply in payment for the wines. This evidence was excluded.

C. L. Lyon, for applt.

Wm. A. Butler, for respt.

Held, error; that the evidence was material and was improperly excluded, as it would have destroyed the effect of the credit acknowledged in the letter as an admission of a consummated sale, and the receipt of payments, on account.

Judgment of General Term, affirming judgment of nonsuit, affirmed.

Opinion by *Rapallo, J.*

PRACTICE. EXCEPTIONS.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Thomas F. Sharkey, *respt.*, v. Jean G. Torrillion, *applt.*

Decided May 1, 1876.

An exception to the decision of a judge denying a motion for a new trial on the minutes, on the ground that the verdict is against the weight of evidence, instead of its being on the ground of insufficiency of evidence to support it, is valid as to form, though the ground of the motion does not come within the express terms used in §264 of the Code.

Appeal from judgment recovered on verdict, and from order denying motion made upon the minutes of the court for a new trial.

The motion made for a new trial upon the minutes was placed upon the ground that the verdict of the jury was against the weight of evidence.

The action as it was finally tried, was for damages for the breach of a contract, by which the defendant covenanted to receive the conveyance, and pay the purchase price, of seven houses and lots, on the southerly side of Seventy-

eighth street, in the city of New York. The contract was executed on the 25th day of October, 1869, and by its terms, it was to be fully and finally performed, on the 25th day of November following, at noon on that day, at the office of Pinkney & Spink, counsellor, &c. The defendant did not appear at that time and place, but the plaintiff did, and was ready and willing to convey the property. But it appeared that the gas fixtures had not then been put in the dwellings, and the contract required by its terms that they should be completely finished by the plaintiff and provided with gas fixtures. In this respect plaintiff was apparently in default, and the failure was a material one, because the expense of supplying the fixtures would be at least \$600 for each one of the dwellings.

To excuse himself from the default, the plaintiff claimed that it had been agreed between himself and the defendant, after the contract was executed, that an abatement of either six or eight hundred dollars should be made, in the purchase price of each of the lots, for which the defendant should supply the gas fixtures himself. By his own evidence alone it appeared that a paper to that effect was written for and subscribed by the plaintiff. He testified that it was done in Judge Alker's office, and that he was the counsel for the defendant, who was also present at the time assenting to the change. When the instrument was subscribed, he testified that it was left with, and retained by Judge Alker. He did not in his evidence testify to any delivery, or acceptance of it, by the defendant, but simply that it was taken and retained by Judge Alker. The defendant denied the existence of any such understanding, or agreement, and it was not pretended

that he executed it, and the evidence of Judge Alker was positive that he had no such paper, and was not authorized to do any such thing as the plaintiff stated he had done, concerning the gas fixtures. There was no evidence given to show that he was in fact authorized to receive any agreement, for the defendant, exonerating the plaintiff from the performance of the contract in any respect whatever. The jury returned a verdict for plaintiff for \$7,000.

Held, That without some evidence upon the subject from which it could be implied that Judge Alker intended to assent to the acceptance of the writing for defendant, no delivery of it would exist from the mere circumstance that Judge Alker may have received, and retained it. He testified that he had no authority from the defendant to do that, and none was shown by the plaintiff, beyond the fact that Judge Alker was defendant's counsel, which would fall very far short of supplying him with authority to modify or change the contract the defendant had entered into. Upon this subject the evidence of the plaintiff was vitally defective.

Held further, that though the ground of the motion for a new trial, to wit: that it was against the weight of evidence, was not expressly one of the grounds within the provisions of the Code, for a motion for a new trial upon the minutes, yet it was clearly within the intention and spirit of § 264, as no good reason could have existed, which would have induced any legislative discrimination between the case of a verdict standing on insufficient evidence, and one against the weight of evidence.

The order denying the motion made upon the minutes for a new trial, should therefore be reversed, and an order entered setting aside the verdict,

and directing a new trial on payment by the defendant within twenty days after notice of the decision, of the costs of the trial already had, and ten dollars costs of opposing the motion; the costs of the appeal to abide the event of the action.

Opinion by *Daniels, J.*; *Davis, P. J.*, concurring.

NATIONAL BANKS. RECEIVERS.

U. S. CIRCUIT COURT—WESTERN DISTRICT OF TENNESSEE.

Wright v. The Merchants' National Bank.

In the absence of action on the part of the Controller of the Currency, the courts have power to appoint a receiver of a National Bank upon application by a judgment creditor, subject, possibly, to his being superseded by the action of the Controller.

When the general Banking Law does not provide for action by the Controller, a judgment creditor is entitled to the aid of a court of equity.

Demurrer to judgment creditor's bill.

The bill set forth in substance that complainant had recently obtained judgment of \$10,000 against defendant in the state court; that she was unable to obtain payment of the same; that the bank had closed its doors, discontinued business, and was insolvent; and that in contemplation of such insolvency had conveyed and transferred all its assets to one creditor, viz: a correspondent bank in the city of New York, which was also a large stockholder in defendant's corporation; that this preferred creditor is appropriating all the assets to its own debt; that nothing will be left for the plaintiff, or can now be collected by legal process, and she therefore prays for an injunction and receiver.

Demurrer was taken upon the sole ground that under the provisions of the national banking law, a receiver could only be appointed by the Controller of the Currency.

Brown, J.—If a judgment creditor may not invoke the aid of a court of equity he is powerless to enforce his claim, unless he can persuade the Controller of the Currency to interfere in his behalf. Sec. 5242 of title 62 of the Revised Statutes, which applies to cases like the present one, makes all such transfers and conveyances null and void. No method, however, is provided of winding up a bank guilty of any of the acts mentioned in the section, nor is the power given to the Controller of the Currency apparently designed to reach these cases. It is doubtful whether he would have power in such cases to interfere and appoint a receiver.

But even if the power had been given to the Controller of the Currency to appoint a receiver in cases like the present, in the absence of restrictive language, it is at least doubtful whether it should be regarded as forestalling the jurisdiction of the courts. The general rule in regard to the election of remedies is that "Where a right originally exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old common law, the party has his election either to sue upon the old common law or to proceed upon the statute; the statutory remedy is only cumulative." Sedgwick on Statutory Law, 93-401; 10 Barb., 260; 16 Sim., 271; 17 Sim., 167.

It is not intended in this case to decide whether the court would be authorized to appoint a receiver upon the happening of the contingencies author-

izing such appointment by the Controller of the Currency. I am clearly of the opinion, however, that when the act does not provide for the introduction of the Controller, a judgment creditor is entitled to the aid of a court of equity.

Nor is there any force in the objection that a receiver appointed by this court would be powerless to obtain possession of the surplus of bonds on deposit in Washington for redemption of its circulating notes. I cannot assume that the Controller of the Currency would refuse to comply with the order of a court having jurisdiction of the case.

On the whole, I am of opinion that in the absence of action on the part of the Controller of the Currency, this court has the power to appoint a receiver upon the application of a judgment creditor, subject, possibly, to his being superseded by the action of the Controller.

Demurrer overruled.

STOCKHOLDERS' LIABILITY.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Cornelius H. Delamater, *respt.* v.
James A. Rhodes, *applt.*

Decided May 1, 1876.

Trustees of stock company may purchase property necessary for the business, and issue stock to the amount of the value thereof.

If the property has no definite value it must be estimated.

Motion by defendant for a new trial on exceptions to be heard in the first instance at General Term.

Plaintiff recovered a judgment for \$5,000 against the Metal Chemical and Manufacturing Company, and issued

execution, which was returned unsatisfied.

Plaintiff now sues defendant, who is a stockholder in said company to an amount greater than the plaintiff's claim, under Sec. 32, 2 R. S. p. 660, (5th edition), on the ground that the capital stock had not all been paid in.

It appeared that the capital stock was issued upon certain terms to one of the corporators, in payment for certain patent rights, which were taken out by the corporators for that purpose; and that no part of the capital stock was paid in in money.

The question was submitted to the jury, as to whether this transaction was an evasion of the statute.

No estimate of the value of these patents appears to have been made by the incorporators.

Erastus Cook, for resp.

B. F. Mudgett, for applt.

On appeal.

Held, That under the provisions of the act of 1853, chap. 333, the trustees may purchase property necessary for the business of the company, and issue stock to the amount of the value thereof. They are not authorized to do more, and the property therefore represents the capital stock only to the extent of its value.

The defendant failed to show, either that the patents were valued at any sum, when the company was formed, or what was their actual value at that time. The value of a patent is much a matter of conjecture, until the process to which it relates has been tried. But experiments had been made with the patents in question, and some information gained from the results, which would have enabled the corporators to have formed an estimate of their value.

Had they exercised an honest judgment and a fair discretion in reference to them, the stockholders would not have been liable.

But this they failed to do; and such omission was important and fatal to the defendants.

Judgment affirmed.

Opinion by *Brady, J.; Davis, P. J. and Daniels, J.*, concurring.

EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM
FIRST DEPARTMENT.

Geo. W. Southwick, applt. v. Benj. F. Mudgett, resp.

Decided May 1, 1876.

When money is sued for as a loan, for which a receipt had been given, it is competent to show that it was not a loan, but a deposit for a specific purpose.

In action on a note it is competent to show a want of consideration.

Appeal from judgment entered on report of referee.

Plaintiff claims to have loaned defendant \$3,000, and brings this action to recover the same.

Defendant denies the loan, and alleges that the money had been given him by plaintiff, to be invested in a certain sewing machine company, on the understanding that if the company should dissolve, and not reorganize, defendant should pay back the \$3,000, otherwise it was to be invested in the company's stock.

That the company was afterwards reorganized and the money invested in its stock, and also set up a counterclaim for professional services for \$3,200.

The issues were referred to *Henry Nicholl, Esq.*, to hear and determine.

Plaintiff put in evidence the receipt given by defendant on receiving the money:

"NEW YORK, April 25, 1867.

"Received of G. W. Southwick, Esq., three thousand dollars, to be paid on demand, with interest.

"B. F. MUDGETT."

And objected to defendant's giving any parol testimony tending to show any such understanding, as claimed by defendant, or to his showing that the money was not given as an absolute loan: on the ground that the terms of the written instrument could not be varied by parol evidence.

The evidence throughout was conflicting.

The referee found that the complaint should be dismissed and \$1,000 counterclaim allowed defendant.

W. A. Arnoux, for applt.

Jno. H. Hand, for resp't.

On appeal.

Held, That it would be a sufficient answer to plaintiff's objections to defendant's testimony, that the action was for a loan, and not on a written instrument. It was certainly competent for defendant to show that the sum given was not a loan, but a deposit, for a purpose in plaintiff's interest, and to which it had been applied.

But assuming that the paper was a promissory note, it was equally competent, for the defendant to show a want of consideration, and this he did, for he showed that the money paid him, was employed for plaintiff's benefit, and in the manner directed by him.

The counterclaim was allowed on conflicting testimony, and we cannot say that the referee was not justified in his findings in this respect.

Judgment affirmed.

Opinion by *Brady, J.*; *Davis P. J.* and *Daniels, J.*, concurring.

CONSTRUCTION OF WILL.

N. Y. COURT OF APPEALS.

Gourley, admr. &c., *resp't.* v. Campbell et al., *applts.*

Decided May 23, 1876.

The provisions of a will which provides that the executors shall place the proceeds of collection of debts due testator and all his property real and personal at interest on bond and mortgage or otherwise, as in their judgment they may deem best, and that the proceeds, rent, income, or interest should be used for the support of testator's wife and children, and devising and bequeathing all his property to the children on the death of the wife, are too indefinite to authorize a conclusion that the executors were bound to sell the real estate in any event.

The personal property being sufficient to support and educate the children and maintain the widow, the land retained its original character and descended to the heirs.

This action was brought for a construction of the will of one H. and for the appointment of a trustee to carry out an unexecuted trust under it.

The will, after providing for the collection of all sums due testator and the settlement of his business and the payment of his debts, contained these words:

"My executors shall place the proceeds thereof and all my property, both real and personal, at interest on bond and mortgage or otherwise as in their judgment they may deem best."

This was followed by a direction that the proceeds and rent, income, or interest shall be employed and used for the support and maintenance "of my beloved wife, Elizabeth, and for my children, and their education." By the concluding portion of the will the testator devised and bequeathed to his

children, by name, all his "estate both real and personal of all kinds whatsoever, to be divided equally among them on the death of the mother."

The personal estate of the testator was sufficient for the support and education of his children and maintenance of the widow.

All the testator's children died unmarried and intestate prior to the death of his widow. None of the real estate was sold by the executors. Upon their death an administrator with the will annexed was appointed, and upon the death of the widow there remained in his hands a surplus of the personal property, rents, &c. The plaintiff in this action, the administrator with the will annexed, and next of kin to the widow claimed, and the court below found, that the testator intended to convert the real into personal property; that upon the death of the last surviving child it vested in the widow as personal property, and a trustee was appointed to carry out the trusts by selling the real estate.

Rob't Johnston, for applt.

C. F. Brown, for resp't.

Held, error. That the testator made no such disposition of his real estate by his will as to constitute an equitable conversion of it into money. 46 N. Y. 162; 1 Hoff. Ch. 218.

That the provisions of the will were too indefinite to authorize the conclusion that the executors were bound to sell in any event.

Also held, That there being no necessity for a sale of the real estate the land retained its original character and descended to the heirs. 2 Ves. Jr., 271; 4 Edw. Ch. 613; 6 J. R. 73; 3 Cow. 651; 5 Paige, 447; 2 Bro. Ch. Cas. 595.

Also held, That the costs being in the discretion of the court, and the questions involved being difficult and intricate, they should be paid out of the property.

Judgment of General Term, affirming judgment of Special Term, reversed.

Opinion by *Miller, J.*

MORTGAGE FORECLOSURE.

N. Y. COURT OF APPEALS.

McMurray et al., respts., v. McMurray, applt.

Decided May 23, 1876.

Where a life estate is left to a widow, with remainder to infants, she stands in a position of trust towards such infants. And where she sold a portion of the property (under a power in the will) for a very low price, and did not apply the proceeds on a mortgage on the property, but allowed it to be foreclosed, the decree of foreclosure is ineffectual to bar the equity of the infant remaindermen, who were defrauded thereby, and they can maintain an original action in equity to avoid it.

The purchaser, the mortgagee, having taken it with full knowledge of all the facts, became merely a mortgagee in possession, and was bound to account to the infant remaindermen for their share of what he realized over and above the mortgage.

A judgment entered without having a guardian ad litem appointed for infant defendants is not absolutely void, but voidable.

This action was brought to obtain relief against a judgment entered by default in an action brought by defendant to foreclose a mortgage. The mortgaged premises were owned by the uncle of plaintiffs and had a frontage of 180 feet on 7th street, Troy, and were mortgaged by him to defendant for \$10,000, in 1856. In January, 1860, the mortgagor died, leaving a

will, of which his wife was executrix, wherein he devised to his widow a life estate in 128 feet front, with remainder in fee in 9-20ths thereof to plaintiffs. All his real estate not disposed of by the will, including the remainder of the mortgaged premises, and his personal estate not disposed of he ordered his executrix to sell and convert into money, and with the proceeds pay and discharge his debts, including the mortgages and incumbrances upon the 7th street property devised as before mentioned. In May, 1860, defendant, who was cognizant of these facts, commenced an action to foreclose his mortgage. The executrix answered, setting up as defences usury, payment and a counter claim. The plaintiffs herein, who were infants at that time, were made defendants, but no *guardian ad litem* was appointed for them. After the action had progressed some months an arrangement was made between the defendant herein and the executrix, whereby, under the power of sale in the will, instead of selling the 52 feet for their full value, which the referee found to have been \$5,950, and applying the proceeds to the reduction of the mortgage, she conveyed them to defendant for the nominal price of \$500, and withdrew her answer in the foreclosure suit and stipulated that judgment might be taken therein for the full amount of the mortgage with interest and costs, without crediting anything for the 52 feet conveyed. Judgment of foreclosure and sale was entered and defendant bid in the premises for \$14,000, which the referee found was much less than their value. There was a surplus of \$2,000, which was never brought into court and of which plaintiffs have received no part, but which was disposed of under an arrangement

between defendant and the executrix. No report of sale was ever filed or confirmed. Defendant entered into possession under the purchase and has realized about \$19,500, of which about \$15,500 were the proceeds of the 128 feet. The executrix, in consideration of the arrangement under which the judgment was obtained, received from defendant a lease for her life at a nominal rent of one of the houses on the 128 feet. Plaintiffs claimed that the judgment was void on account of fraud and because no guardian *ad litem* was appointed for them.

Martin I. Townsend, for applt.

S. W. Jackson, for respts.

Held, That the executrix stood in a relation of trust towards plaintiffs as far as the execution of the powers of sale of the 52 feet was concerned, and it was her duty to obtain as nearly as possible the full value on a sale thereof, and apply it in reduction of the mortgage, and she had no right to convey for a nominal consideration, and under the circumstances the decree of foreclosure as between plaintiffs and the defendant was ineffectual to bar the equity of redemption of the plaintiffs, and they were entitled to have it avoided, and could maintain an original action in equity for that purpose. 8 N. J., 9. That although the judgment might not be void so as to impair the title of *bona fide* purchasers from defendant, yet as between him and plaintiffs he had no equity which should entitle him to retain the fruits of the proceeding or to prevent them from avoiding it. That when defendant entered under his purchase he became merely mortgagee in possession, and was bound to account to plaintiffs for their share of what he realized over and above the mortgage debt.

Also held, That the judgment entered without having a guardian *ad litem* appointed for the infant defendants, though voidable, was not absolutely void. 1 Hill, 130, 143; 18 Vt., 290; 8 Mete., 196; 3 Dev. (N. C.), 241; 17 N. Y., 218; 7 Robt., 147, 546.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Rapallo, J.*

JUSTIFICATION ON UNDERTAKING TO DISCHARGE ATTACHMENT.

N. Y. MARINE COURT. SPECIAL TERM.

John H. Seed v. Maria Teale.

Decided June 14, 1876.

The sureties on an undertaking given to discharge an attachment issued from the Marine Court of the City of New York, may justify before a county judge of the county in which they reside.

Motion to compel sureties to justify before a judge of the Marine Court.

The defendant furnished an undertaking to discharge attachment against her property. The sureties resided in Oneida County, New York. Notice of their justification was given to be had before a county judge of Oneida County. Plaintiffs claimed the justification must take place only before a judge of the Marine Court in New York.

P. Q. Eckerson, for motion.

Charles H. Smith, opposed.

McAdam, J. By the act of 1872 (Chap. 629, § 6), "An attachment may issue in an action in the said (Marine) Court for like causes and in the manner and with like effect as allowed and prescribed by the provisional remedy of the Code of Procedure and for causes allowed by existing law in the said Marine Court."

By force of this act the provisions of the Code respecting attachments with all the concomitants and incidents affecting such proceedings are made applicable to the Marine Court and remain unaltered and unaffected by the act of 1875, which makes no change in the attachment law applicable to the Marine Court.

It is apparent that no change was intended, and none follows by implication. The justification of the sureties on the undertaking to discharge the attachment must therefore be had according to §§ 241, 193 to 196 of the Code.

Motion denied.

REFEREES. EVIDENCE.

N. Y. COURT OF APPEALS.

Lathrop et al., respts. v. Bramhall, admr., &c, et al., applts.

Decided March 21, 1876.

There is a distinction between a reservation of a question as to the effect of evidence, and a reservation as to its admissibility.

Unless the party's rights or interests are injuriously affected by the referee's action in the former case, no rule of law is violated, and the referee has a right to use his discretion in reserving his decision.

Evidence is admissible to confirm oral testimony as to the terms of a contract. There is no valid objection where an oral contract has been made to prove that a memorandum of its principal terms was made and read to the parties at the time.

This action was brought to recover the balance, unpaid, of the price agreed upon for the transfer of certain stocks, and the point in controversy was as to which of the defendants is liable.

Upon the trial defendants' counsel objected to the admission of certain

evidence offered by plaintiffs. The referee reserved his decision, in several instances, until the close of plaintiffs' evidence, when he proceeded to dispose of the objections raised. He refused to decide as to the persons affected by some portions of the evidence, holding that these questions could only be determined when the whole evidence was in, and to that extent overruled defendants' objection. An exception was taken by their counsel, who claimed that they were entitled to an absolute ruling. Upon one of the rulings of the referee reserving his decision, defendants' counsel excepted to the reservation. The referee subsequently made similar rulings declining to decide against which defendant the evidence was allowed, and at the close of the testimony he declined to decide any of the questions thus reserved, stating that this would be determined on the decision of the case.

The evidence in regard to which the referee reserved his decision, affected the most important issues in the case, and the principal question involved, which was the joint liability of all of the defendants for the indebtedness to recover which the action was brought. It could not always be determined, when the evidence was offered, whether it affected one or all of the defendants. It was conceded that the testimony was proper as against one or more of the defendants.

Chas. F. Southmayd, for respts.

Waldo Hutchins, for appls.

Held, (Allen, J., dissenting), no error. That unless it appeared that the defendants' interests or rights were affected injuriously by the referee's action, no rule of law was violated, and the referee was authorized to use his discretion in reserving his decision.

Also held, (Allen, J., dissenting), That there is a distinction between the reservation of the question as to the effect of evidence and a reservation as to its admissibility. A ruling of the latter kind must be considered upon review the same as if an objection had been made and overruled, and the referee's decision excepted to.

The practice of reserving a decision as to the admissibility of evidence when objection is taken is not to be commended. 45 N. Y. 804.

A memorandum was offered in evidence by plaintiffs and received. Defendants' counsel objected to it, that it was not evidence against any of the parties but defendant B. or against any member of the firm of L. C. & Co., except C., and that it was proved that the contract was outside of the memorandum. The referee reserved his decision as to the first two grounds and overruled the objection as to the third ground. Defendants subsequently moved to strike out this evidence, and the motion was denied. The memorandum related to the terms of purchase of the F. Coal Company, and stated the amount of capital stock, the number of shares, the price, and that cash was to be paid upon delivery, and that L. and G. were to have a certain number of shares, which were named, at cost. The evidence tended to show that at the time the sale was made B., one of the defendants, made the memorandum which was found among his papers, and read it over to those who were present inquiring whether it was correct or whether the parties, who were present, should take the stock which was then sold. It was not offered to refresh the memory of the witness.

Held, (Allen J., dissenting), That the evidence was not admissible in that

point of view, and the rule applicable to such a case cannot be invoked, nor was it competent alone as the contract of the parties, but it was evidence which corroborated and confirmed the oral proof, as it coincided with it as to the terms of the contract. The two together showed what the contract was, and there could be no valid objection where an oral contract has been made to prove that its principal terms were written down and a memorandum made of them and read at the time.

Judgment of General Term, affirming judgment on report of referee, affirmed.

Opinion by *Miller, J.*

RESALE OF MORTGAGED PREMISES.

N. Y. SUPREME COURT. GEN'L TERM,
FIRST DEPARTMENT.

John D. Phillips and another and Amos F. Eno, *respts.*, v. Reuben H. Cudlipp, impl'd, &c., *applt.*

Decided May 1, 1876.

A re-sale of premises under a decree of foreclosure will be directed upon equitable terms when the first sale is made in such manner as to prevent a fair competition, or where for any cause it would be inequitable to permit the sale to stand.

An order denying application for a re-sale of mortgaged premises affects a "substantial right" as same has been construed, and is appealable to the General Term, although involving the exercise of discretion.

Appeal from order denying motion for a re-sale of mortgaged premises.

Appellant was the owner of the equity of redemption in premises sold under a judgment recovered January 7th, 1876, in an action to foreclose a mortgage. The premises cost the defendant about the sum of fifty thousand

dollars, and there was due upon the judgment at the time of the sale over thirty-five thousand dollars.

At the sale the property was purchased by the respondent, Amos F. Eno, for the sum of eighteen thousand sixteen hundred dollars. It appeared by the affidavit of one M., who for the defendant, and with the consent of the plaintiffs, endeavored to find a purchaser for the premises at private sale, that George W. Pell had agreed to take the property and pay the sum of twenty-one thousand five hundred dollars for it, and that he was still willing to pay that amount, and that he was prevented from attending the sale by the mistaken assurance given him that the property would be sold at private sale.

On the morning of the sale the defendant, Cudlipp, states that he informed Mr. Cohen, one of the plaintiffs, who was present when it was made, of the offer made by Mr. Pell, and he swears that the plaintiffs' attorney, B., then replied "that it would be better to let the property be sold, let Cohen buy it in, and, "we could then carry out any equitable arrangement afterwards." And that trusting to that understanding he took no further interest in the matter, and supposed the property was struck off to Cohen.

The affidavit of Scott shows that the defendant understood that to be the arrangement, and that no further attention was given to the sale for that reason.

Some of the foregoing statements were modified and changed by counter depositions, but from such depositions it appears that there was great want of confidence by the person making them as to what was said on the morning of the sale, and there were various circumstances in them to support the fore-

going statement of the occurrence as the correct one.

N. B. Hoxie, for applt.

Henry Day, for respnt.

Held, That while the mere prospect that the property upon a re-sale would bring a larger price is not sufficient to order a resale, although it is an important circumstance, yet the facts shown here present a case of surprise on the part of the defendant produced at least by a failure on the part of the plaintiff's attorney to express himself in such a manner and with sufficient clearness, as to avoid misunderstanding as to what was designed to be done with the property at the sale.

Under the rule sustained by the authorities defendants should be relieved in order to secure fair dealing and promote what the facts show to be just and right in the disposition of this property. The misunderstanding can be corrected in no other way. *Duncan v. Dodd*, 2 Paige 99; *Brown v. Frost*, 10 Id., 243; 25 How. 403, 406-7; *King v. Platt*, 37 N. Y. 155.

Held further, That the order made affected a substantial right, as that phrase has in all the later cases been construed by this court and the Court of Appeals. And an appeal from it could be taken to the General Term, even though it depended upon the exercise of discretion. That circumstance only prevents an appeal to the Court of Appeals. It does not affect the power and jurisdiction of this court. The order should be reversed with \$10 costs and disbursements, and an order entered directing a re-sale of the premises on payment by the defendant of the costs of opposing the motion and the costs and expenses of the sale already had, with interest on the deposit

by the purchaser within ten days after notice of this decision, and the adjustment of such costs and expenses, and in case such payment shall not be so made, then the motion should be denied with \$10 costs.

Opinion by *Daniels, J.*; *Davis, P. J.* and *Brady J.*, concurring.

DIVORCE.

PHILADELPHIA COMMON PLEAS.

Sowers v. Sowers.

Decided June 10, 1876.

Where a husband writes a letter to an absent wife, who is residing with her parents, that he will not receive her, and she does not return and try to obtain admission, it is not such a turning out of doors as will entitle her to a divorce.

This is a proceeding for divorce, *a mensa et thoro*; it is instituted by the wife, Josephine G. Sowers, by her next friend, against her husband, William H. Sowers, to whom she was married at Georgetown, in the District of Columbia, on the 19th of May, 1870, and who immediately after her marriage removed to Germantown, the residence of her husband, where, as man and wife, Mr. and Mrs. Sowers continued to reside until the 24th of December, 1873. Mrs. Sowers testifies that on that day she went from Germantown to Georgetown, to make a visit to her friends, and that she has never returned to her home in Germantown.

The reasons for remaining separate from her husband are, that the respondent turned her out of doors, and that he offered such indignities to her person as to render her condition intolerable and life burdensome; thereby forcing her to withdraw from his house and family.

The answer of the respondent expressly denies both allegations; a large

amount of testimony has been taken in support on the one hand, and in denial on the other, upon the vital questions which are presented by the libel and the answer.

Under the second head of legal justification in separating herself from her husband, the libellant charges against him, that he insulted her by false, slandours and opprobrious epithets. That he at various times and for long periods of time refused to speak to her; that when absent from him he neglected to write to her. That he neglected to meet her at the depot on one occasion on her return from a visit to Georgetown. That he addressed insulting letters to her; and that he has neglected her since she has become a mother, in refusing to receive her into his house, and in not contributing means for the support of herself and her child. The child was born at Georgetown, after the libellant last left the home of her husband on the 24th of December, 1874, and has never been seen by the respondent.

On her return from Georgetown defendant neglected to meet her at the Germantown Junction, several miles from her home. Smarting under the irritation of the seeming neglect, instead of going to her home, after so long an absence from it, and seeking an explanation from her husband, if one was required, for this omission of an accustomed attention on his part, she turned away from her home, when almost at its door, and sought the protection of acquaintances in the city, sending no word, until the next morning, where she was, though she knew her return was expected that evening, the testimony showing that preparation had been made for her reception. This is aside from the explanation given by

Mr. Sowers, which, if correctly stated, accounts satisfactorily for his failure to meet Mrs. Sowers, in accordance with his usual habit on such occasions.

The most serious and important of all the charges under this head, which are made by the wife against her husband, grew out of his letter to her of February 3d, 1874, and his refusal to contribute means of support to his wife and child. Mrs. Sowers had been absent from her home from the 24th of December, 1873, on a visit to Georgetown. On January 1st, 1874, she informed her husband by letter of her intention to return to him on the 5th of that month. The material portions of respondent's letter begins with the third paragraph, in which he writes: "I shall not receive you. You left my bed and board without my permission. You have daily and hourly insulted me, and treated me with the utmost contempt. By the laws of my State I cannot refuse you admittance. * * * Your family have played an infamous part in this business, and I suppose they are satisfied, when they are able to keep you six weeks in the hands of your old lovers."

To this letter Mrs. Sowers did not reply, but her brother wrote to the respondent immediately on the receipt of it, saying: "She will now remain with those who know how to appreciate her," and asking that her individual property, clothing, &c., should be sent her. The decision of Mrs. Sowers to remain in Georgetown is placed by her brother on the ground of a refusal of Mr. Sowers to receive his wife into his house. From that time all direct communication between the libellant and the respondent ceased. She did not write to him informing him of the

birth of their child, though her physician did; and the respondent asserts, and makes it one of his causes of complaint, that when she left him, on the 24th of December, he did not know that she expected to become a mother, asserting that she had kept from him all knowledge of her situation. This assertion of the respondent was denied by the libellant, and in connection with this denial she charged against her husband, as an act of cruelty, that he had made no inquiries about her or her child. In her testimony she says:

"He has never contributed one penny towards the support of either of us—he has never visited either of us."

Allison, J.—In *May v. May*, 12 P. F. S. 206, in support of the demand of the libellant in this case, the question of actual turning out of doors was not raised. The husband's proposition was to allow his wife to return to his house and occupy a small sleeping room, have the care of her children and eat at his table, but on the condition, that she was denied all control of the house, was required to take a position in the family subordinate to a servant who had treated her unkindly. This in connection with proof that he whipped her with a cow-hide, treated her with cruelty and neglect in her confinement, inflicted personal violence, which was evidenced by her screams and the marks upon her person, was all submitted to the jury upon the question of infliction of indignities to the person which justified the wife in withdrawing from the family of her husband. These facts make out a case widely different from that of the libellant, who never manifested a desire to return to her husband, nor has she asked an explanation of the letter upon which libellant and respondent

have placed such opposing interpretations. If the conduct of the respondent is to be judged by the letter of the 5th day of February, it falls very far below the facts proved in the case of *May v. May*. We have the oath of the respondent in support of the allegation that no more was meant by the expression than that he would not meet her at the junction as he had done on all prior occasions, except the one to which we have referred, and that all accustomed privileges in the home of his mother, which was his home also, were reserved for his wife; that her room was prepared for her reception, and had been kept awaiting her return ever since. Whether this is a correct explanation of the declaration that he would not receive his wife, we have no means of determining, except the oath of the respondent, and the qualifying statement in the letter, that "by the laws of my State I cannot refuse you admittance." The libellant, placing her own construction on this letter, has thought proper to rest upon that construction, and to remain in Georgetown separate and apart from the respondent.

We have no case in Pennsylvania, in which the suit of the wife was maintained on the ground that she was turned out of doors, where it was not shown that the wife was ejected by force, or was compelled to leave because of a threat to employ it, and a reasonable apprehension that it would be used against her; or a refusal to receive her upon demand that she should be taken into her husband's home as a wife; or an emphatic refusal to allow her to remain and "behave herself as a good wife ought to do." Or lastly, where the facts did not show a justification on the part of the wife, in withdrawing from

the home of her husband; facts which would entitle her to a divorce in her suit against an offending husband.

This case does not, in our judgment, come up to the requirements of the law on either ground on which the libellant rests her suit; we therefore refuse to grant the divorce from bed and board for which she prays.

AGREEMENT. DEMAND.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Fox et. al., administrators, *appls* v. Fox, *respt*.

Decided June, 1876.

Under an agreement by a party, in consideration of the use and proceeds of a farm and title to same on decease of owner, to take care of owner and his family, &c., the death of such party terminates agreement, and his representatives cannot recover for his time and labor as improvements, but they can for what he originally brought on to the farm and its increase.

In 1860 one W. D. F. entered into an agreement with defendant whereby in consideration of the use and proceeds of a farm belonging to defendant and the title to the same, and also to certain personal property on decease of defendant, W. D. F. was to run said farm and take care of and support said defendant and family during his life. W. D. F. entered into possession of said farm and continued to occupy same under such agreement until 1870, when he died.

At the time W. D. F. went into possession of said farm he brought on to the farm certain personal property of his own. While in possession certain improvements and repairs were made.

This action was brought by the administrators of W. D. F. to recover for his services and for improvements and for value of property he brought on the farm.

A demand was made before action for the property brought on the farm by W. D. F., and defendant replied to the demand that if they could find any property of W. D. F. on the farm they could have it. The referee held this demand bad and gave judgment for the defendant.

A. B. Moore, for appls.

B. Bagley, for respt.

Held, That the death of W. D. F. terminated the agreement, and his representatives could not recover for the improvements put on by W. D. F., or for his services while occupying farm, as it does not appear that the repairs and improvements were put on the farm at defendant's request, or that the avails of the farm all went to defendant.

That the demand for the property brought on to the farm by W. D. F. of defendant was good. Defendant had the power to deliver the property immediately, and his refusal to deliver the property, although he knew what it was, was a conversion.

That plaintiff as the representative of W. D. F. was clearly entitled to such property. That where property consists of several articles, it is customary to give a list when a demand is made, but in cases like this it is often impracticable to do so, and the party in possession is the only one who can give a list or description of the property. The demand in this case imposed on defendant the duty either of deliv-

ering the property or taking the ground that the intestate owned none of the property in his possession, and he assumed the risk of being held guilty of converting such property if the person making the demand should be able to prove it belonged to the person in whose behalf he made the demand.

Judgment reversed.

Opinion by *Mullin, P. J.*

USURY.

N. Y. COURT OF APPEALS.

Estevez et al., applts., v. Purdy et al., respts.

Decided June 20, 1876.

Where an agent, who is employed to effect a loan on bond and mortgage, retains a part of such loan, upon the pretense that a portion thereof is for his services and the balance a bonus for his principals, without the knowledge of the principals, they not receiving any portion of the part so retained, the mortgage is not usurious.

Alger v. Gardner, 54 N. Y., 360, distinguished and limited.

This action was brought for the foreclosure of a mortgage made by defendants, Purdy and wife. The answer set up as a defense usury. It appeared that the money (\$5,000) was loaned by an agent of plaintiff's, and that he, in making the loan, without their knowledge or consent, took from defendants \$500, upon the pretense that a portion of it was for his services and the balance a bonus for his principals. The agent was not authorized to loan the money at a greater rate than seven per cent., and no part of the bonus was received by plaintiffs. At the end of a

year from the making of the loan defendants paid thereon \$2,500. In a short time they applied to plaintiffs' agent to have the \$2,500 reloaned to them on the same security, and it was agreed between them and plaintiffs that the money should be so reloaned and that plaintiffs should hold the mortgage as a security for the full \$5,000. Plaintiffs' agent upon this reloan exacted \$225, professedly for his principals, but it was really for himself. Plaintiffs did not share it or know anything about that it was demanded professedly for them. Evidence tended to show that plaintiffs before it was given knew that the agent charged this sum, and the judge so found.

Samuel Hand, for applts.

Moses Ely, for respts.

Held, That plaintiffs were not affected by the wrongful act of their agent, as they did not expressly, impliedly or apparently authorize it, and as they did not consent to or participate in the extortion, but simply took a security for the amount loaned, with lawful interest, it was not usurious. 21 N. Y., 219; 32 Id., 165; 3 Abb. Ct. App. Dec. 43. That if plaintiffs had knowledge of the subsequent claim of a bonus, it did not vitiate the original security, but that it did not appear that they knew that the allowance was actually made or that any claim was made, save for the agent's services. *Alger v. Gardner, 54 N. Y., 360, distinguished and limited.*

Order of General Term reversing judgment for plaintiffs reversed and judgment of Special Term affirmed.

Opinion by *Earl, J.*

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TRUSTS. EQUITABLE ACTION.

N. Y. COURT OF APPEALS.

Bruner, *respt.*, v. Meigs et al., trustees, &c., *appls.*

Decided April 4, 1876.

Where a testator devises his property to his executors as trustees, directing them to divide it in seven equal parts, the income of one part to be paid over to each of his children during their lives, and on the death of any child, to convey his share to his issue, a valid several trust is created for each of testator's children living at his death in one-seventh part of the estate, which ceased with the life of the cestuis que trust.

Two of the children having died before the testator, their shares went to the heirs, of testator and not to the executors in trust. The shares vested immediately in those entitled in remainder, and did not depend upon the power given the executors to transfer such shares, and the vesting could not be defeated or delayed by the neglect or omissions of those vested with the power.

An agreement for the sale of a portion of the real estate having been made by the trustees, a suit in equity to rescind the agreement can be maintained as an action to recover money paid upon a consideration which had failed, the title not being such as the purchaser was bound to accept.

This action was brought for a rescission and cancellation of an agreement of sale of certain real estate made between the parties. It appeared that one P. devised his property to defendants, as trustees, directing that it should be divided into seven equal parts, the income of one part to be paid over to each of his children during their lives, and upon the death of any child, to transfer

and convey his share to his issue. Two of the children died before the testator, without issue. The testator gave the trustees full power and authority during the continuance of such trusts to sell any part of the property so held by them. The will also provided that certain charges entered on the testator's books should be deducted from the shares of his children, respectively. In 1872, one of the children died, leaving a widow and issue. At the time of the making of the agreement the grantor's estate had not been divided.

Jno. J. Macklin, for appls.

Osborn E. Bright, for respt.

Held, That a valid several trust was created by the will for each of the testator's children living at his death, in one-seventh part of the estate; that the two-sevenths designed for the two children that died before the testator, upon his death went directly to his right heirs and did not go to the executors in trust; that an estate was vested in the executors during the continuance of the trust, which ceased with the life of the *cestuis que trust*. 2 Keen, 664; 4 M. & C., 460. That the power to transfer the share of the estate to those entitled after the death of the *cestui que trust* for life did not constitute a trust, but was merely a power in trust, and could be executed as such; that the estate and interest of those entitled in remainder did not depend upon the execution of that power, and the vesting of their estate could neither be defeated nor delayed by the neglect or omission of those vested with the power. 43 N. Y., 303; Id., 99.

That the direction in the will to ascertain the advancements and deduct the same from the respective shares of the children did not delay or defer the time at which the estate should be di-

vided into shares as directed, or continue or extend the trusts; and that as a suit in equity to rescind an agreement for the sale of real estate by reason of a defect in the title or want of power to sell in the vendors, the action could not be maintained, because plaintiff had a perfect defense to any action which might be brought to enforce the agreement, but it could be maintained as an action to recover money paid upon a consideration that had failed, defendants' title not being such as plaintiff was bound to accept.

Judgment of General Term, affirming judgment in favor of plaintiff, affirmed.

Opinion by *Allen, J.*

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

U. S. SUPREME COURT.

Gaines, *plff in error*, v. Fuentes, et. al., *defts. in error*. (October, 1875.)

A suit to annul a will as a muniment of title, and to limit the operation of a decree admitting it to probate, in all its essential elements is a suit for equitable relief, and if it can be maintained in a State court, may also be maintained by original process in a Federal court, or removed thereto, where the parties are residents of different States.

In error in the Supreme Court of the State of Louisiana.

This is an action in form to annul an alleged will of Daniel Clark, the father of the appellant, dated on the 13th of July, 1813, and to recall the decree of the court by which it was probated. It was brought in the Second District Court for the parish of Orleans, which, under the laws of Louisiana, is invested with jurisdiction over the estate of deceased persons, and of appointments

necessary in the course of their administration.

The petition sets forth that on the 18th of January, 1855, the appellant applied to that court for the probate of the alleged will; and that by decree of the Supreme Court of the State the alleged will was recognized as the last will and testament of the said Daniel Clark, and was ordered to be recorded and executed as such; that this decree of probate was obtained *ex parte*, and by its terms authorized any person, at any time, who might desire to do so, to contest the will and its probate in a direct action, or as a means of defence by way of answer or exception, whenever the will should be set up as a muniment of title; that the appellant subsequently commenced several suits against the petitioners in the Circuit Court of the United States to recover sundry tracts of land and properties of great value, situated in the parish of Orleans and elsewhere, in which they are interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator; and that the petitioners are unable to contest the validity of the alleged will so long as the decree of probate remains unrecalled. The petitioners then proceed to set forth the grounds upon which they ask for a revocation of the will and the recalling of the decree of probate, these being substantially the falsity and insufficiency of the testimony upon which the will was admitted to probate, and the status of the appellant, incapacitating her to inherit or take by last will from the decedent.

A citation having been issued upon the petition and served upon the appellant, she applied in proper form, with a tender of the necessary bond, for removal of the cause to the Circuit Court

of the United States for the District of Louisiana, under the twelfth section of the judiciary act of 1789, on the ground that she was a citizen of New York and the petitioners were citizens of Louisiana. The court denied the application, for the alleged reason that, as the appellant had made herself a party to the proceedings in the court relative to the settlement of Clark's succession by appearing for the probate of the will, she could not now avoid the jurisdiction when the attempt was made to set aside and annul the order of probate which she had obtained. The court, however, went on to say in its opinion that the Federal Court could not take jurisdiction of a controversy having for its object the annulment of a decree probating a will.

The appellant then applied for a removal of the action under the act of March 2d, 1867, on the ground that from prejudice and local influence she would not be able to obtain justice in the State court, accompanying the application with the affidavit and bond required by the statute. This application was also denied, the court resting its decision on the alleged ground, that the federal tribunal could not take jurisdiction of the subject-matter of the controversy.

Other parties having intervened, the applications were renewed and again denied. An answer was then filed by the appellant, denying generally the allegations of the petition, except as to the probate of the will, and interposing a plea of prescription. Subsequently a further plea was filed to the effect that the several matters alleged as to the status of the appellant had been the subject of judicial enquiry in the Federal courts, and been there adjudged in

her favor. Upon the hearing a decree was entered annulling the will and revoking its probate. The Supreme Court of the State having affirmed this decree, the case was appealed to this court.

Held, error; That if the Federal court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the Parish Court of Orleans, it was invested with the necessary jurisdiction by the act of 1867 itself, so soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies, from a State court to a Federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases. The language used in *Smith v. Rines*, cited from the 2d of Sumner's Reports, in support of the position that such cases are only liable to removal from the State to the Circuit Court as might have been brought before the Circuit Court by original process, applied only to the law as it then stood. No case could then be transferred from a State court to a Federal court on account of the citizenship of the parties, which could not originally have been brought to the Circuit Court.

But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a monument of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree al-

leged to have been obtained upon false and insufficient testimony. There are no separate Equity Courts in Louisiana, and suits for special relief, of the nature here sought, are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court, where the parties are on the one side citizens of Louisiana, and on the other citizens of other States.

Nor is there anything in the decisions of this court in the case of *Gaines v. New Orleans*, reported in the 6th of Wallace, or in the case of *Broderick's will*, reported in the 21st of Wallace, which militate against these views. In *Gaines v. New Orleans* this court only held that the probate could not be collaterally attacked, and that until revoked it was conclusive of the existence of the will and its contents. There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a Federal as well as in a State court, if jurisdiction of the parties was once rightfully obtained.

In the case of *Broderick's will*, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of Courts of Equity, independent of statutes, a bill will not lie to set aside a will or its probate; and whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts

and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the State Courts of Equity by statute, is there recognized, and that when so vested the Federal courts, sitting in the States where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.

There are, it is true, in several decisions of this court, expressions of opinion that the *Federal courts have no probate jurisdiction, referring particularly to the establishment of wills*, and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties; indeed, in the majority of instances no such controversy exists. In its initiation all persons are cited to appear, whether of the State where the will is offered or of other States. From its nature and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different States, of which the Federal courts have concurrent jurisdiction with the State courts under the judiciary act. But whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

But, as already observed, it is sufficient for the disposition of this case that the statute of 1867, in authorizing a transfer of the cause to the Federal

court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally and settle the controversy involved.

It follows from the views thus expressed that the judgment of the Supreme Court of Louisiana must be reversed, with directions to reverse the judgment of the Parish Court of Orleans, and to direct a transfer of the cause from that court to the Circuit Court of the United States, pursuant to the application of the appellant; and it is so ordered.

Opinion by *Field, J.*; *Waite, C. J.*, and *Bradley and Swayne, J. J.*, dissenting.

WATER COURSES. DEED. ESTOPPEL.

N. Y. SUPREME COURT. GEN'L TERM.
FOURTH DEPARTMENT.

Outhank, *applt.*, v. The L. S. & M. S. R. R. Co., *respt.*

Decided June, 1876.

A party having, for a valuable consideration, given another the right to run pipes over his land for the purpose of conveying the water of a brook, is estopped from questioning such other's right to such water. But where a party lays certain sized pipes and uses them for some time, he cannot replace them by larger ones without being liable for damages for excess of water taken.

This action was brought for damages for conversion of water and trespass, &c.

Plaintiff is owner of certain lands over which runs a small brook.

The land above him is owned by one B.

In 1863, B sold to defendant the right to erect on his land a certain reservoir, and to draw and use the water of such brook. Plaintiff also, for a

valuable consideration, gave to defendant the privilege and right to run pipes over and through his land to conduct the water from such reservoir to defendant's water tank. The pipes were laid, the reservoir was built and used for some years. The pipes as first laid did not use all the water of the brook.

In 1871, the defendant relaid the pipes and put down larger ones, which used up all the water of the brook in dry seasons. It was also shown that persons other than defendant were in the habit of using the water from defendant's tank.

Plaintiff was non-suited.

H. C. Kingsbury, for *applt.*

Lanning & Willets, for *respt.*

Held, That the grant from Brown of the right to divert the water, not limiting the amount of water in any way the grantee might take from the reservoir, it was the right of the grantee to take whatever quantity it deemed necessary for its use. When, however, the grantee constructed a reservoir and put down certain sized pipes it thereby ascertained and limited the quantity it was entitled to take by virtue of the grant.

The plaintiff, although he sold the right to lay the pipes through his land, knowing the purpose for which they were to be used, was entitled to the water left after defendants got their supply, and he was entitled to damages for the extra amount of water taken by the new and larger pipes.

Whether others than defendant could use water from the tank, *quære*.

Non-suit set aside.

Opinion by *Mullin, P. J.*

PARTNERSHIP. ACCOUNTING.
N. Y. SUPREME COURT. GENERAL TERM,
FOURTH DEPARTMENT.

John McCall, *respt.* v. Henry Heditch,
applt.

Decided April, 1876.

In an accounting between partners it is competent to show by witnesses doing the same kind of business as the partners, the amount of business done by such partners and the profits arising therefrom, as against one of the partners who kept the books of the partnership in so careless a manner that a proper accounting cannot be had from them.

The parties were partners in trade in the business of butchering. The partnership being dissolved, this action was commenced to obtain an accounting and the appointment of a receiver.

The referee to whom the issues were referred stated an account, wherein he finds that the defendant is indebted to plaintiff in the sum of \$1,313.92. That the defendant kept the books and received and disbursed the money, but kept the books in so careless a manner that an account cannot be stated from them.

Butchers doing business in the same city, who were occasionally in the shop of the partners, were examined as to the amount of business done by them as compared with that done by the co-partnership, and the profits per pound on the various kinds of meat purchased and sold.

From this data, thus furnished, and from the evidence of the partners themselves, the referee has stated an account.

D. C. Hyde, for *respt.*

E. Webster, for *applt.*

Held, That from the evidence submitted it cannot be assumed that the account of the referee is not correct.

Opinion by *Mullin, P. J.*; *Smith* and *Noxon, JJ.*, concurring.

PRINCIPAL AND AGENT.

N. Y. COURT OF APPEALS.

Claffin et al., *appls.*, v. Lenheim,
respt.

Decided June 6, 1876.

It is the duty of a principal, when he terminates the agency, to notify all parties who have been in the habit of dealing with the agent.

The fact that dealings between the parties had been suspended for two years, and that on resuming them the principal dealt directly with the parties, is not sufficient to constitute constructive notice of the revocation of the agency.

This action was brought to recover the price of certain goods alleged to have been sold by plaintiffs to defendant. It was proved that H., defendant's brother, had, for several years prior to July, 1867, conducted a store at Meadville, Pa., in the name of defendant, and had been in the habit of purchasing goods of plaintiff for that store. These purchases were made in the name and on the credit of the defendant and the bills rendered to and paid by him. Defendant conceded that previous to a fire in that store in July, 1867, H. was authorized to purchase goods in his name, but that after the fire he terminated such authority. The purchases for which this action was brought were made by H., for the Meadville store, in November and December, 1869, in the name of defendant. After the store was burned, plaintiffs sued defendant and issued an attachment against him for a bill then due for goods furnished the store. This claim and the costs of the proceedings were paid by the defendant in

August, 1867, and defendant thereafter suspended all dealings with plaintiffs until October, 1869, when he resumed them and made purchases for a store he kept at Great Bend, Pa. Defendant gave evidence tending to show actual notice to plaintiffs of the revocation of the agency of H. after the fire in July, 1867. They conceded that they had notice of the fire, but the evidence of notice of revocation of the agency was controverted. The court submitted to the jury the question whether plaintiffs had notice of the revocation, but charged that if the jury concluded that the circumstances were such, independently of notice, that in fair dealing plaintiffs should have inquired of defendant at Great Bend whether he continued the store at Meadville, and whether H. was authorized to buy goods in his name, that would preclude a recovery, and further that if the jury concluded that no notice in fact was given, and that the circumstances were such as to put plaintiffs fairly upon inquiry as to whether that business was continued by defendant, and H. was authorized to make the purchases, that ended defendant's responsibility.

A. J. Vanderpoel, for appls.

A. G. Rice, for respt.

Held, That the court properly submitted to the jury the question whether plaintiffs had notice of the revocation of the agency, but that the question whether circumstances which were undisputed were sufficient to put a party on inquiry and thus charge him with constructive notice was not for the jury, but for the court. 24 N. Y., 550; 17 Pick, 91; 29 N. Y., 220.

Also held, That the circumstances existing at the time of the sale of the

goods were not sufficient to constitute constructive notice of the revocation of the agency, and that the case should have been submitted to the jury only upon the question of notice in fact, that it was defendant's duty when he terminated the agency of H. to notify all parties who had been in the habit of dealing with him as agent.

Judgment of General Term, affirming judgment on verdict for defendant, reversed and new trial ordered.

Opinion by *Rapallo, J.*

LEASE. FRAUD.

N. Y. SUPREME COURT. GEN. TERM.

FOURTH DEPARTMENT.

Edick, applt. v. Dake, respt.

Decided June, 1876.

Fraud in executing lease will vitiate it although party injured had friends present who could read and who could examine lease.

Plaintiff, by parol, agreed to lease of defendant a farm for one year, with privilege of five if he did not sell it.

Plaintiff, after this, went to defendant's house with two friends, and the lease was read over by defendant and executed. Plaintiff after this carried on to the farm some of his property. Defendant soon after sold the farm and plaintiff was told he could not have the farm. On examining the lease plaintiff found that it contained a clause that the lease was for five years, reserving to defendant the right to sell the farm, or any portion of it, at any time, by allowing plaintiff to harvest the crop he may have planted. Plaintiff proved by two witnesses, who were present when the lease was executed, that defendant read the lease over but read it as parol agreement was, and not as it really was. That defendant offered to let plaintiff read it but he replied he could not read,

but it was not offered to the others present.

This action was brought for damages for the fraud. Plaintiff got judgment before the Justice, it was reversed in County Court, and appealed here.

O. & E. C. Olney, for applt.

Geo. W. Daggett, for resp't.

Held, That this was a clear case of fraud, and the evidence should have been submitted to the jury in the county court. Defendant knew that the contract of the lease did not contain the provisions which he read as being contained therein, and as he represented were contained in it. He knew plaintiff could not read, and that he relied on his (plaintiff's) reading of it, and it is no answer to this charge of fraud that he might have had the friends who were with him read it to him.

This is not a case where a party is not allowed to rely on the representations of the other party.

Judgment reversed.

Opinion by *Mullin, P. J.*

SUMMARY PROCEEDINGS.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

The People, ex rel. Charles Mordaunt
v. James W. Fowler, Justice, &c.
Decided 1876.

In summary proceedings to remove tenants a service of the summons upon the tenants and undertenants by leaving a copy thereof at their place of business with a person of mature age, and who at the time of the service was on and employed on the premises, is insufficient.

And where an objection to the regularity of the service is made preliminarily, which is overruled and exception taken, by subsequently offering evidence the tenants do not waive the defect in the service of the summons.

Certiorari to the respondent, a Justice of the third District Court in the City of New York, to review summary proceedings by which the tenants W. & W. and the undertenant Charles Mordaunt were removed from the premises No. 109 Washington Street, New York City, by a warrant issued by the aforesaid justice.

The summons was served upon the tenants and undertenant by leaving a true copy thereof at their place of business, No. 109 Washington Street, with a person of mature age, whose name the deponent was not able to ascertain, and who at the time of the service, was on and employed on the premises, the tenants and undertenant being at the time absent from the said place of business.

E. H. Benn, for relator:

Geo. W. Niles, landlord, and counsel in person.

Held, This service was entirely insufficient under the act of 1868 (Laws 1868, Chap. 828).

To make the service of a summons upon a person employed on the premises valid within the law governing the subject, it is necessary to prove:

1. That the tenant could not be found, so that personal service could be made.
2. That he was absent from his place of residence.
3. That no person of mature age resided at his place of residence.
4. Or that his place of residence was not in the city.
5. That no one resided on the demised premises.
6. That the tenant could not be found on the demised premises.
7. That the person on whom it was served was not merely employed on the

premises, but connected with the premises "by employment in any business for which the premises were used."

None of these prerequisites were established. The service was not good and the justice acquired no jurisdiction. Act of 1863, *supra*. 1 Hill, 512.

The counsel for Mordaunt objected preliminarily to the sufficiency of the affidavit of the service of the summons. The objection was overruled and the counsel excepted.

The respondent urges that by the appearance of the tenant and under-tenant the irregularity, if any, was waived.

Held, This view is erroneous. It is not sustained by authority, and cannot rest on principle. The question of jurisdiction is open to examination at all stages of a controversy, unless waived, which does not always follow from an appearance when the objection is taken, overruled and exception noted.

The proceedings were erroneous and the result must be reversed and restitution ordered with costs.

Opinion by *Brady, J.; Davis, P. J., and Daniels, J.*, concurring.

COSTS.

N. Y. COURT OF APPEALS.

Powers et al., applts. v. Gross, respt.

Decided June 13, 1876.

In an action to recover damages for the conversion of chattels, where plaintiff claimed \$500 and recovered \$35, defendant is entitled to costs. Plaintiff cannot by an excessive claim oust a justice of the peace of jurisdiction and thereby entitle himself to costs. The verdict is conclusive as to the amount in controversy and in determining whether a justice of the peace would have jurisdiction.

This action was brought to recover \$500 damages for the conversion of chattels, stated to be worth \$146.

A verdict of \$35 was rendered for the plaintiff. Both parties claimed to be entitled to costs. The clerk refused to tax plaintiff's costs, but did adjust the defendant's under objection from plaintiff's counsel. A motion was made at Special Term for an order setting aside the taxation of costs in favor of defendant, and directing the clerk to adjust costs in favor of plaintiff, which motion was denied, and on appeal to the General Term the order denying judgment was affirmed.

Estes & Barnard, for applts.

J. I. Perry, for respt.

Held, no error. That by the provisions of § 305 of the Code, defendant was entitled to costs; that the cause of action was of the class within the jurisdiction of a justice of the peace (Code § 23); that plaintiffs could not, by an excessive claim of damages, oust a justice of the peace of jurisdiction and thereby entitle themselves to full costs in a higher court upon recovery of a nominal sum.

That the verdict was conclusive as to the amount in controversy and in determining whether a justice of the peace would have had jurisdiction, and as affecting the question of costs.

Order affirmed.

Opinion by *Allen, J.*

PRINCIPAL AND AGENT.

SUPREME COURT OF PENNSYLVANIA.

Wray, plff. in error v. Evans, deft. in error.

Decided Jnn. 6, 1876.

The immediate employer of the agent or servant who causes the injury, is alone responsible for such injury; to

him alone the rule of respondeat superior applies, and there cannot be two superiors severally responsible.

Error to the Court of Common Pleas No 2, Alleghany County.

By agreement between the Pittsburgh Gas Company and James T. Wray, the latter undertook to dig a trench, in which to lay the gas pipes of said company, in Gas street and Second avenue, from the works of said company to the gas holder, in the 14th Ward of the city of Pittsburgh. This work was to be done under the supervision of the company's engineer. It was also part of the contract, that should Wray, at any time, neglect or refuse to supply a sufficiency of material or workmen to properly execute the work, the company might furnish the same, after giving three days notice, and charge the same over to Wray.

By a sub-contract similar in its terms, except that if the work was not done to the satisfaction of the gas company's engineer, the contract was to be forfeited on two days notice, Wray passed the job to Michael Davis. Each of the contracts contained a covenant that the contractor should be responsible for all losses, damages, fires, and recoveries that might happen or be had by reason of the carrying on of said work, arising through negligence, mistake or otherwise.

In execution of his contract with Wray, Davis proceeded to dig the trench along Second avenue, into which, on the night of October 9th, 1873, the plaintiff fell and broke his leg. The evidence shows that Davis employed and supervised the hands who did this work, and that Wray had no control whatever over them.

Held, That the immediate employer of the agent or servant, who causes the injury, is alone responsible for such in-

jury; to him alone the rule of *respondeat superior* applies, and there cannot be two superiors severally responsible.

Also held, That the doctrine of *respondeat superior* has no applicability to the defendant in this case. As long as Davis continued to progress with the work, in a manner satisfactory to the engineer of the gas company, Wray had no more power over the work than an entire stranger. Had he volunteered advice as to the care necessary to preserve the public from danger, it would have been to no purpose, as he had no power to enforce it. The matter was out of his hands; he could not assume the control of the work until the sub-contract should be forfeited by non-performance.

Again, beyond controversy, Davis was, in this case, liable for the negligence of his employees in the prosecution of the work; hence, to charge this negligence over to Wray is to make two superiors severally liable for the same injury or misfeasance. This, however, violates the rule already referred to, which negatives such a proposition.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by *Gordon, J.*

TOWN BONDS. BONA FIDE HOLDER.

U. S. CIRCUIT COURT—NORTHERN DISTRICT OF NEW YORK.

Manassah Bailey v. The Town of Lansing.

Where a county judge has decided that town bonds shall be issued for railroad purposes, and appointed commissioners for that purpose, and a certiorari is granted to review his decision, and the commissioners afterwards issue the bonds to the railroad company, both parties having

knowledge of the certiorari, the railroad company acquires no title to the bonds which they can enforce against the town.

An innocent purchaser of such bonds would acquire the rights of a bona fide holder of commercial paper and could recover, but the burden of proof is upon him to show that he is a purchaser in good faith and for value; he cannot rely upon the presumption derived from his possession of the coupons before they became due.

The facts of the case appear in the opinion.

Wallace, J. This action is brought upon interest coupons originally attached to bonds issued in aid of the Cayuga Lake Railroad Company by commissioners appointed for that purpose by the county judge of Tompkins County, under the provisions of the bonding acts of 1870 and 1871 of the State of New York.

These acts authorize the county judge, upon the presentation of a petition by the requisite number of the tax-payers of the county, to ascertain by judicial inquiry if the majority of the tax-payers in number and in taxable property desire the town to issue its bonds in aid of the railroad, and if he ascertains such to be the case, he is to appoint three commissioners to execute and issue bonds in behalf of the town and invest them in the stock or bonds of the railroad company.

The county judge having entertained the petition of the tax-payers and taken proofs, adjudged that the bonds should be issued, and appointed commissioners for the purpose. Opposing tax-payers contested the proceeding, and, pursuant to the statute, obtained a writ of certiorari for the review of the decision of the county judge by the Supreme Court. Upon review, the

Supreme Court reversed the judgment. This reversal, in legal effect, vacated the entire proceedings taken before the county judge. The certiorari was the common law writ. After it was issued and notice thereof given to the commissioners, and before the commissioners had taken the oath of office required by law preliminarily to entering upon the duties of their trust, they executed and delivered the bonds to the railroad company, the latter having full notice of the certiorari, and giving the commissioners a bond of indemnity.

It does not appear how plaintiff acquired title to the coupons in suit, but does appear that they were in his possession before they fell due. It does not appear whether or not he ever owned the bonds to which the coupons were originally attached. Upon these facts, I do not think the plaintiff is entitled to recover. The bonds were originally negotiated between the commissioners and the railroad company in violation of good faith. The parties to the transaction were aware that proceedings were pending to annul the authority of the commissioners to issue the bonds. When the certiorari issued, the judgment and proceedings upon which it was founded were removed to the Supreme Court, and all proceedings under the judgment which had not actually been put in motion were suspended. The decisions of this State are uniform that upon the allowance of a certiorari the effect of the judgment which it is taken to review, except in the single exception of an execution already issued and in the process of being executed, is suspended as to all proceedings under it and as to all collateral matters. The judgment is not even evidence in a case between the same parties. It is as completely sus-

pended as though it had never been rendered. *Lannitz v. Dixon*, 5 Land., 249.

Under these circumstances, the commissioners were no more justified in attempting to issue bonds in behalf of the town than they would have been if their agency had been revoked; and the railroad company, having knowledge of the fact, acquired no title to the bonds which they could enforce as against the town. The case is not analogous to that where property has been sold under an execution upon a judgment subsequently reversed. I do not intend to intimate that if the bonds had been issued by the commissioners after the certiorari, and came to the hands of an innocent purchaser, the latter would acquire no title. Although the authority of the commissioners to act as agents of the town was suspended, such a purchaser would acquire the rights of a bona fide holder of commercial paper, and could recover against the principal as though the authority once conferred upon the agent had never been revoked. But in such case it would be incumbent upon the plaintiff to show that he had purchased innocently, relying upon the ostensible authority of the agent. *Coddington v. Bay*, 20 John. 636.

These views lead to the conclusion that when it appeared that the bonds were issued in fraud of the rights of the defendant, the burden was cast upon the plaintiff to show that he was a purchaser in good faith and for value. He could not rest upon the presumption derived from his possession of the coupons before they became due. *Regers v. Morton*, 12 Wend., 484; *Smith v. Sac County*, 11 Wall., 139.

Judgment is ordered for the defendant

ATTORNEY'S COSTS. SETTLEMENT.

N. Y. SUPREME COURT. GENERAL TERM
FOURTH DEPARTMENT.

Coughlan, applt. v. The N. Y. C. and H. R. R. Co., respt.

Decided June, 1876.

A settlement made after suit is commenced and without notice to an attorney is not good, and the attorney may either prosecute the action or sue the parties making such fraudulent settlement.

Plaintiff was injured on defendant's road. After the injury an attorney called on him and offered to prosecute the action against said Railroad Company to judgment in consideration of receiving one-half the recovery, and the attorney was to pay all the expenses.

The action was commenced by the service of a summons on a director of defendant. When the summons was served, the director was notified of the claim of the attorney and the nature of it, and the General Superintendent of defendant was also notified of the attorney's claim. After the summons was served and after this notice, defendant settled with plaintiff for \$1000.

The attorney then prosecuted the action, and in its answer defendants set up the release of plaintiff, and offered same in evidence on trial. The referee, to whom the action was referred found the release fraudulent and void as against the attorneys. That the attorneys had no notice of the settlement. That they had a written agreement with plaintiff to prosecute said action and pay expenses. That plaintiff sustained damages by reason of the accident to the extent of \$1000.

The plaintiff appeals.

Strong & Goodyear, for applt.
Lanning & Willetts, for respt.

Held, That although generally an attorney has no lien for his costs until the recovery of a judgment or verdict, the court will protect the attorney against a fraudulent or collusive settlement between his client and the adverse party, by setting aside any release that may have been given, or where the right to costs has not become complete by reason of there being no recovery entitling the attorney to his costs, the attorney will be permitted to proceed in the action as if no release had been given, until the costs are collected.

That if the fraudulent release is given on the fraudulent settlement made before verdict, and the case is one in which the damages in the case must be ascertained before the right of the attorney to costs is determined, the relief he is entitled to is to prosecute the action to judgment, or where that cannot be done, to prosecute a new action against whoever may be legally liable to redress the wrong done him. That the attorney in this case is allowed to go on with the action so far as is necessary to protect him.

That the release having been set up in the answer, the referee was justified under the code in trying the question whether or not the same was fraudulent, and any matter constituting a defense to such part of the answer was competent.

That it was the duty of the referee, having found the release fraudulent, to have complied with the request of the plaintiff's attorney and ascertained the damages sustained by the plaintiff, and to have given judgment against the defendant for one-half the amount thereof.

Judgment reversed.

Opinion by *Mullin, P. J.*

QUO WARRANTO. POWER OF LEGISLATURE.

N. Y. COURT OF APPEALS.

The People, *applts.* v. Flanagan, *re-spt.*

Decided May 23, 1876.

The People having, through their constitutional agents ratified an election at which a judicial officer is elected, it is not competent for them to question it by quo warranto.

It is competent for the legislature, as between the people and one elected to office, to construe its own act, and to waive any irregularity in holding the election and thus confirm the title.

This was an action in the nature of a *quo warranto* to test the title of defendant to the office of Justice of the Tenth Judicial District Court of the City of New York, which district is composed of the three towns set off from Westchester county and annexed to the city of New York by chap. 613 of the Laws of 1873, passed May 23, 1873.

The 5th section declared what territory should constitute the district, and that "at the next general election," there should be elected a justice of said district. Section 18 declared that the act should take effect January 1, 1874, "except as to such parts as are otherwise provided for, and as to such parts it shall take effect at the time or times in this act specified."

Defendant was elected at an election in 1873, at which the candidates for the office were put up and voted for. He entered upon the discharge of his duties January 1, 1874, and has continued to discharge them since that time, and there is no other claimant for the office.

In 1874 another act was passed, Chap. 329 of the laws of 1874, which re-enacted, with some amendments, said chapter 613, Laws of 1873,

and declared by the 18th section that the several acts done and performed under the act of 1873 were expressly confirmed, and provided that the provisions in that act as to acts to be done prior to the passage of this act shall be construed as if this act had passed on the 23d day of May, 1873.

Plaintiffs claim that election was premature, and could not have taken place until the general election in 1874, and that the election was void because not conducted according to the laws applicable to the city of New York in respect to registry, &c.

Geo. H. Foster, for applts.

Abel Crook & John Flanagan, for resp't.

Held, That it was to be assumed that the act of 1874 was intended to confirm such election, and to recognize, so far as the legislature could, the defendant as legally entitled to the office. Its legal effect may be regarded as a legislative construction of the act of 1873, both as to the time of holding the first election of District Justice and the inapplicability of the registry acts of the city of New York, and as a confirmation of the election, even if conducted irregularly.

Also held, That the people having, through their constitutional agents ratified an election and recognized the title of defendant to the office, it was not competent for them to question it by *quo warranto*.

The legislature had full power to do this. *People v. Bull*, 46 N. Y., 57, distinguished.

It was competent for the legislature as between the people and defendant to construe its own act and to waive any irregularity in holding the election, and thus to confirm the title.

Judgment of General Term affirming judgment for defendant on verdict, affirmed.

Opinion by *Church, Ch. J.*

PROMISSORY NOTE. EXCEPTIONS.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Lattimer et al., *applts.* v. Hill et al.,
resp'ts.

Decided June, 1876.

If the charge of a judge is erroneous, it is the duty of the court to grant a new trial, although neither the evidence nor the charge was excepted to. A party to a note may annex to such note any condition as to its delivery he may deem proper.

Defendants are endorsers on a promissory note.

At the time the note was endorsed it was proved that one of the plaintiffs asked defendants to endorse the note and said that they need have no fears of ever being liable upon it, as they (plaintiffs) would reserve out moneys going to the maker, who was working for them, and would see that same was paid; that they could not, under the laws, take the note unless endorsed, &c.

No objection was made to the reception of this evidence.

The court charged the jury that if they believed the story of the transaction at the time the note was endorsed that plaintiffs were to hold it and not to make defendants liable, but to charge the same in an account to the makers, &c., plaintiffs could not recover. The counsel for the endorsers did not except to this part of the charge, but seeks to take advantage of it now.

Defendants claimed, that by reason of this agreement of plaintiffs to pay the note out of money due the makers

for certain work, &c., defendants were prevented from filing a lien on the building which was being made.

The court in referring to this subject in his charge, says :

"It is said on the part of defendants that they were prevented, by reason of the agreement, to file a lien, &c., and if they had they would have got their pay ; and it is said that this may, and probably does, account for their not filing a lien, had they not supposed that note had been accepted as so much money. You will consider all circumstances which bear one way or the other, and see what the contract probably was by which plaintiff took this note."

There was judgment for defendant.

J. W. & H. J. Dining, for appls.

J. W. Sanford, for respts.

Held, That although the evidence as to the agreement under which the note was given and that portion of the charge in reference thereto, was not excepted to, if the charge was erroneous this court will order a new trial, as the failure to except did not injure plaintiff.

That the party making a contract can annex to its delivery such conditions as he may deem proper, and if such conditions are not performed he will be discharged therefrom.

That there is ground to apprehend, that from the judge's charge as to the mechanic's lien, &c., the jury understood the judge to instruct them that if the plaintiffs' conduct in reference to the note had any influence in inducing the endorsers to omit to file a mechanic's lien and thus secure the payment of the note, they might find for the defendants, and as such an instruction would be wholly unauthorized and calculated

to mislead, the judgment must be reversed.

Opinion by *Mullin, P. J.*

SERVICE OF SUMMONS.

N. Y. COURT OF APPEALS.

Person, *applt.* v. Markle et al., *respts.*

Decided April 28, 1876.

Neither a party nor a witness attending a court in this State from a foreign State can be served with a summons, unless he loses his privilege by remaining within the State an unreasonable length of time after the close of the trial.

This was an appeal from an order of General Term affirming an order of Special Term setting aside the service of a summons in this action. It appeared that the summons was personally served at Elmira, in this State, on defendant G., who was a resident of Pennsylvania, at the conclusion of a trial upon which he had been in attendance in good faith as a witness.

J. McGuire, for *applt.*

N. C. Moak, for *respts.*

Held, That the service was properly set aside ; that neither a party nor a witness attending a court in this State from a foreign State can be served with a summons unless he loses his privilege by remaining within the State an unreasonable length of time after the close of the trial. 2 J. R. 292 ; 3 Cow. 381 ; 1 Wend. 292 ; 3 Duer, 622 ; 23 How. 331.

Order affirmed.

Opinion by *Allen, J.*

CONDITIONAL SALES. AMENDMENTS.

N. Y. SUPREME COURT. GENERAL TERM.
FOURTH DEPARTMENT.

Daniel J. Cushman, *applt.* v. Eli B. Jewell, *respt.*

Decided April, 1876.

In cases of conditional sales where the title is to vest in the purchaser upon payment of the price, the purchaser may perfect his title to the property at any time by tender of the price, although it is payable by installments and they are not due. If the debt was payable with interest, the purchaser must pay interest until the maturity of the debt.

An amendment to a complaint striking out a waiver of a tort will not be allowed.

This action was brought before a justice of the peace who rendered judgment in favor of the plaintiff.

On appeal to the County Court the judgment was reversed. The plaintiff appeals to this court. The evidence shows that the defendant sold to Mrs. K. a sewing machine for \$25, payable in monthly instalments, with interest, and took her note containing the following clauses and conditions, viz.:

"It is expressly understood that the said E. B. Jewell neither parts with nor do I assign any title to said machine until said note is fully paid, and it is as expressly understood that I am not to remove said machine from my present place of residence, Rome, N. Y., without the consent of the said E. B. Jewell." In case of default in payment, defendant was authorized to enter on the premises of Mrs. K. and remove said machine, and collect all reasonable charges for the use of the same.

Underneath the signature of Mrs. K. is the following:

"I herein further agree that if I violate any part of the within I forfeit all that has been paid on the within, or may have been paid on the same."

On the 7th day of May, 1874, Mrs. K. paid on said note \$5, \$5 on the first day of June, and on the first day of July \$5.

On or about the 25th of July, 1874, plaintiff bought of Mrs. K. the said machine, and on the first of August following it was taken from the plaintiff by defendant.

Plaintiff made a demand for the machine which was refused.

On the first of August Mrs. K. went to defendant's house and tendered to defendant the \$5, being the installment falling due on the first of August, and also \$5.56, being the installment not paid in April and interest thereon.

The defendant refused to receive it, and Mrs. K. retained the money for him.

S. J. Barrows, for *applt.*

Ball & Searles, for *respt.*

Held, That under the contract between Mrs. K. and the defendant, evidenced by the paper called a receipt, Mrs. K. had no title to the machine when she sold it to or exchanged with plaintiff, and could not, for that reason, convey any to him. The removal of the machine by plaintiff from Mrs. K.'s house forfeited her right to the possession of the machine, but it did not necessarily annul the sale to her. She paid the balance due on the machine before the defendant took possession; her title became perfect, and the plaintiff acquired a valid title to it under his agreement with Mrs. K.

The evidence does not make a case allowing plaintiff to waive the tort and sue on contract; that can only be done when the wrong-doer has sold or otherwise disposed, so that it may be assumed he received the value of it in money or its equivalent.

Opinion by *Mullin, P. J.; Smith and Noxon, J.J.*, concurring.

JURISDICTION.

SURROGATE'S COURT. NEW YORK Co.

In the matter of the Estate of John B. Kelly, deceased.

Decided June 13, 1876.

A petition of administrators to the Surrogate for authority to sell real estate to pay debts, which omits "to state a description of all the real estate of deceased, whether occupied or not, and if occupied, the names of the occupants," will not confer jurisdiction on the Surrogate to grant the order to show cause.

If the requirements of the statute which prescribes what such petition must state, may be disregarded in one particular, it may be in all.

Sections 1, 2 and 3 of Chap. 82, Laws of 1850, and the amendments of Sec. 3 by Chap. 260, Laws of 1869, and Chap. 92, Laws 1872, do not cure or obviate such omission.

Said Sections 1, 2 and 3 are not applicable to proceedings before the Surrogate, and do not relieve him from requiring strict conformity to the requirements of the Revised Statutes governing such proceedings. To hold otherwise would nullify Sec. 4 of same act. That section prohibits the Surrogate from confirming a sale "unless upon due examination he shall be satisfied that the provisions of the title of the Revised Statutes (governing such proceedings) have been complied with, as if this act had not been passed."

This is an application for an order confirming the sale of certain real estate, ordered to be sold under the provisions of the Revised Statutes, for the purposes of paying the debts on application of the administrators.

The petition was filed June 28th, 1875, on which day an order, requiring all persons interested in said estate to show cause on the 18th day of August,

1875, why authority should not be given to sell so much of the real estate of the deceased as should be necessary to pay his debts, was granted.

Service of this order together with publication was made, and on the 28th day of September in the same year an order was made by the then Surrogate reciting the petition for leave to sell, the order to show cause, proof of service thereof, together with publication, and that the Surrogate, on due examination, being satisfied that the administrators had fully complied with the provisions of the statute, that the debts, for the purpose of satisfying which the application was made, were due and owing, and not secured by judgment, or mortgage, &c., stating the amount, and that the personal property was insufficient for such payment, and the Surrogate, having inquired and ascertained whether sufficient moneys for that purpose could be raised by mortgage or lease, and it appearing that it could not, and that said administrators had executed a bond with sufficient sureties, approved according to the statute, which bond was filed, it was ordered that said administrators sell the premises described, prescribing the credit to be given on the sale to the purchaser, and that the administrators file a return, &c.

This order was signed by the then Surrogate, with a memorandum in pencil at the left of the signature, "signed provisionally," which, it appears, meant subject to filing and approval of the bond, as is supposed, at all events the bond seems not then to have been given, but was afterwards, and on the 6th day of March, 1876, presented at the Surrogate's office and filed by the clerk, but was not actually approved

until May 25, 1876, and was in the penal sum of \$3,000.

Subsequently, and on the 24th day of May, 1876, a duplicate (substantially) of the order of sale above described, bearing date the 17th day of March, 1876, was presented to the present Surrogate for the purpose, as is supposed, of curing the defect, if any, of the former order being signed before execution, delivery and approval of the bond, and the omission of Surrogate Van Schaick to sign the latter order, and was then signed by the present Surrogate.

On the 25th day of May, 1876, on an affidavit setting forth the facts in respect to the signing of the first order, and the delay in giving the bond, and that such bond was delivered March 6, 1876, to the chief clerk, and the omission of the late Surrogate to sign said order of sale of date of March 17th, and that such omission was by inadvertence, together with an order that the order of sale aforesaid be signed by the present Surrogate *nunc pro tunc*, was presented and signed for the purpose of curing the defect or omission referred to, it appearing that the sale of the premises had been already made.

It appears by the petition in this matter that it omits to state the description of all the real estate of which the intestate died seized, with the value of the respective portions or lots, and whether occupied or not, and if occupied, the names of the occupants, in conformity to 2d Revised Statutes, 104 Section, 2d Statutes at Large.

It also appeared, by deposition, that the recital in Surrogate Hutchings' order of sale, that the bond had been given according to law was not true, and that the order of sale bearing

date the 17th day of March, 1876, was not in fact granted by the late Surrogate, Van Schaick, but that he was then absent from the city and never returned alive.

On an examination of the records of the office, no evidence appeared that the late Surrogate ever took proof of any debts against the estate in question, prior to his order under the statute, except such proof as was furnished by the petition in this matter, or that any such debt was ever adjudged valid or subsisting against said estate, or was entered in the Book of Proceedings, or the vouchers supporting the same filed pursuant to Section 13 of said statute.

Chas. C. Egan, for Admrs.

Chas. M. Hall, for purchaser.

Calvin, Surrogate. Objection is taken by the counsel for the purchaser on the sale of the premises in question, among numerous others, that the late Surrogate Hutchings did not obtain jurisdiction of the parties, or the subject matter aforesaid, by reason of the defects of the petition, and second, because of the non-adjudication of the claims against the estate, and their non-entry in the Book of Records, and that the order of sale was defective because made before the execution, filing and approval of the bond, and that the said order of sale, supposed to have been made by Surrogate Van Schaick, was not in fact made by him, and therefore the order for signature thereof *nunc pro tunc*, is invalid, and that the first signature by the present Surrogate was not authorized by the act of 1874, Chapter 9, as not being a record of a will or proof or examination taken before the predecessor of the present Surrogate, or a record of

letters testamentary, administration, or guardianship.

It is claimed by counsel for the petitioner, that it is the duty of the Surrogate under Sec. 30, 2d Revised Statutes, page 109, to confirm the report of sale in this matter, because it appears to have been legally and fairly conducted, &c., but in order to determine under that section whether the sale has been legally made, it becomes necessary primarily to enquire whether jurisdiction was obtained of the subject matter and of the parties interested by the petition and order to show cause and the service thereof.

It is clear that the petition does not conform to the 4th subdivision of Section 2, 2d Revised Statutes, 104. That section prescribes, as it seems to me, the facts that are necessary to be inserted in order to obtain jurisdiction: the language of the section is "Petition shall set forth," and the omission of any of its requirements fails to secure jurisdiction.

It cannot be denied that the petition in this matter was defective in the particulars above referred to, and if the requirements of the Statute, prescribing what the petition shall contain, may be disregarded in one particular, it may be in all, but it is urged by the petitioner's counsel that under the act of 1850, Chapter 82, Sections 1, 2 and 3 and the amendments of Section 3 by Chapter 260 of the Laws of 1869, and 92 of the Laws of 1872, the objections referred to are cured.

By section 1 of the act of 1850, it is provided that the title of any purchaser at any such sale, made in good faith, shall not be impeached or invalidated by reason of any omission, error, defect or irregularity of the proceeding before the Surrogate, or by any allegation of

want of jurisdiction on the part of such Surrogate, except in the manner and for the causes that the same could be impeached or invalidated, if made pursuant to the order of a court of original general jurisdiction.

The second section provides that such sale shall not be invalidated or impeached for any omission in any petition for such sale, provided it shall substantially show that an inventory has been filed, and that there are debts which the personal estate is insufficient to discharge, and that recourse is necessary to the real estate.

The third section provides that such sale shall not be invalidated by reason of an irregularity in any matter or proceeding after the presentation of any petition, and the giving notice of the order to show cause, &c., and this provision is substantially preserved in the several acts amending the 3d Section.

It is also claimed by said counsel that Section 1 of Chapter 359 of the Laws of 1870, precludes the purchaser from objecting to the completion of his purchase because he has not appealed, or taken proceedings to set aside, open, vacate, or modify the proceedings in this matter, and several authorities are cited to sustain this view.

The case of *Forbes v. Halsey* is cited as authority for the doctrine that no sale shall be invalidated by reason of any irregularity occurring after the presentation of the petition, but that was a case of ejectment, and clearly within the provision of the act of 1850.

The learned counsel has evidently failed to appreciate the object of that act, when he seeks to make sections 1, 2 and 3 of that act applicable to proceedings before the Surrogate, and gives no force to section 4, which seems to be the only section affecting the Surrogate,

and one which specifically provides that he shall not confirm any such sale, unless, upon due examination, he shall be satisfied that the provisions of said title have been complied with, as if this act had not been passed, showing conclusively that the act in question was not intended to relieve the Surrogate from strict conformity to the Revised Statutes, but only to throw such guard around the purchaser, by presumptions of regularity, after the Surrogate has acted.

I think the act of 1870, in its 1st section, does not contemplate any limitation of the strict requirement of the Revised Statutes in conducting such proceedings, and are not applicable to such proceedings pending before that officer; otherwise it would nullify the 4th section of the act of 1850. I am therefore of the opinion that the several acts referred to do not relieve the Surrogate from strict conformity to the Revised Statutes in respects to all the proceedings required by their provisions, and that it is my duty to recognize and act upon any objection of irregularity as well as of jurisdiction, on this hearing.

And as I am not satisfied that the provisions of the Revised Statutes in respect to the sale and disposition of the real estate of the intestate have been complied with, I should refuse to confirm the report of sale. *Ackley v. Dygert*, 33 Barb. 176; *Farrington v. King*, 1 Brad. 182; *Wood v. McChesney*, 40 Barb. 417.

It is well settled upon authority that any recitals of jurisdiction in any of the orders of the former Surrogate cannot affect the question of jurisdiction. See *Sidley v. Waffle*, 16 N. Y. 189. Having reached the conclusion that there is a defect of jurisdiction to

make the order of sale, it is not perhaps necessary that I should consider the other questions involved in this matter, but it may be proper to state that after the Surrogate acquires jurisdiction, any other proceedings required by the statute, that may have been omitted in the progress of the proceedings, might be supplied by being taken *nunc pro tunc*, such as the proof and adjudication of claims, the entry of the order for sale, the execution and approval of the bond, as this court possesses the same authority as other tribunals to remedy and correct errors or mistakes in the course of proceedings, in cases where jurisdiction has been regularly acquired.

See *Farrington v. King*, above cited, at page 191.

For the defective character of the petition in this matter, the motion to confirm the sale must be denied.

CHARGING SEPARATE ESTATE. N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPARTMENT.

John G. C. Todicker, respt. v. Mary A. Cantrell, applt.

Decided May 1, 1876.

Insertion in note of married woman, after its execution, of words making it binding on her separate estate, if authorized by her, is valid.

Appeal from judgment entered on verdict of a jury.

Defendant, who is a married woman, applied to one of her tenants, one Harms, for a loan, and he being unable to furnish it, she asked him if he knew any one who would, agreeing to pay him a bonus if he would get the loan for her.

He called upon plaintiff, who loaned the amount desired, \$700, taking defendant's notes therefor. These notes

Harms endorsed at the time of making, and was paid by defendant \$45 as a bonus.

When the notes were given, as alleged by plaintiff, he said that he would see his counsel, and if there was any change in their form necessary he would make it, to which defendant assented, and thereafter was added: "I hereby charge my separate estate with the payment of the above."

Defendant denied that she had authorized the change, and alleged that the bonus of \$45 had been given plaintiff, and that the notes were therefore usurious.

Both the question of authority to make the change and of usury were put to the jury, which rendered a verdict for plaintiff.

Dan'l T. Robertson, for resp't.

H. H. Morange, for applt.

On appeal.

Held, That the question of defendant's having authorized the change was fairly put to the jury, and they found for plaintiff. The authority conferred by defendant and in the manner described, was abundant. The design was to make the notes valid instruments against her as *feme covert*, and this was plaintiff's right for the consideration given.

But if the notes had not been thus altered plaintiff could still have recovered as he proved that the loan was made for the benefit of her separate estate.

The question of usury was given on conflicting evidence to the jury, and they found against defendant, and the proof showed that plaintiff received none of the bonus, and that it was not intended he should.

Judgment affirmed.

Opinion by *Brady J.*; *Davis, P. J.*, and *Daniels, J.* concurring.

ACCIDENTAL INSURANCE.

N. Y. COURT OF APPEALS.

Shader, adm'r, &c., *applt.*, v. The Railway Passenger Assurance Co. of Hartford, *resp't.*

Decided June 20, 1876.

*Where a policy of accidental insurance contains a provision that "no claim shall be made * * where the death or injury may have happened while the insured was, or in consequence of his having been under the influence of intoxicating drinks," and the insured, while in that state, was shot, Held, that the limitation related to his condition, not to the cause which might produce his death.*

It was not essential to work a forfeiture that the injury or death should occur in consequence of the use of intoxicating liquors.

This action was brought upon an accidental insurance policy, which provided that "no claim shall be made under this policy where the death or injury may have happened while the insured was, or in consequence of his having been under the influence of intoxicating drinks." It appeared that after receiving his insurance ticket, the assured spent the day with one W., and during the day he and W. drank from a bottle of champagne and a bottle of Irish whiskey, but neither appeared under the influence of liquor when they sat down to dinner at five o'clock. Champagne and whiskey were put upon the table, and both drank. Several witnesses swore that the assured showed by his manner and speech that he was under the influence of liquor. Others who saw him either shortly before or at the beginning of dinner thought him not under the influence of liquor, if he had drank any. While at dinner, W. shot the insured, inflicting a wound of which he died. The judge stated to the jury, that the question was not sim-

ply whether the deceased was under the influence of intoxicating liquors at the time he was shot, but whether the injury occurred in consequence thereof, and was the natural and reasonable result of his being in that condition, and he charged, in substance, that if the injury happened in consequence of his being under the influence of intoxicating liquors, the plaintiff could not recover. Defendant's counsel requested the court to charge that if, at the time the assured was shot, he was under the influence of intoxicating drinks, plaintiff could not recover, and this was so whether the influence of the liquor occasioned the discharge of the pistol or not. This was declined and exceptions taken.

J. B. Adams, for applt.

Geo. F. Danforth, for resp't.

Held, That the proposition laid down by the judge was erroneous, and he also erred in refusing to charge as requested; that the limitation in the policy related to the condition of the assured, not to the cause which might produce his death; that it was not essential to work a forfeiture that the injury or death should occur in consequence of the use of intoxicating liquors. *Bradley v. Mut. B. L. Ins. Co.*, 45 N. Y., 222, and *Weltz v. Conn. M. L. Ins. Co.*, 48 Id., 34, distinguished.

Judgment of General Term, reversing judgment for plaintiff on verdict and granting a new trial, affirmed.

Opinion by *Miller, J.*

BONA FIDE HOLDER. COUPONS. INTEREST WARRANTS.

N. Y. COURT OF APPEALS.

Evertsen, resp't., v. *The National Bank of Newport, appl't.*

Decided April 18, 1876.

Where detached coupons and interest warrants have been stolen, a bona fide transferee for value acquires a valid title to the coupons, but not to the interest warrants.

Coupons payable to bearer are promissory notes and negotiable, and their validity is not destroyed by being separated from the bonds. They are entitled to the benefit of the days of grace allowable on bills and notes payable at a given time.

Interest warrants of a railroad company are not within the provisions of 1 R. S., 768 negotiable instruments as between third persons.

This action was brought against the I. B. & W. R. Co. to enforce the payment of ten coupons of the said company, and forty-seven interest warrants of the D. U. B. & P. R. R. Co., each of which represented the semi-annual interest due April 1, 1871, on a \$1,000 bond. The present defendant, having claimed the interest, was substituted as defendant in place of the Railway Co., the latter having paid the amount due into court. The coupons promised to pay the bearer \$35 at a day and place named, for semi-annual interest on bond No. —. The others were as follows: "\$35. Interest warrant for thirty-five dollars, \$35, upon bond No. — of D. U. B. & P. R. R. Co., payable in gold coin at the office of the Farmers' L. & T. Co. in the City of New York, April 1, 1871," the number of the bond to which they were attached being inserted in each. It appeared that the coupons and interest warrants were stolen from defendant and were purchased by plaintiff, who was a broker, in good faith, without knowledge or notice that they had been stolen, and that he paid full value therefor.

Samuel Hand, for applt.

N. C. Moak, for resp't.

Held, That as to the coupons of the I. B. & W. R. Co., they were promissory notes and negotiable, and the rule of *caveat emptor* did not apply and plaintiff's title to them was valid. 102 Mass. 503; 29 N. Y., 220. That their validity was not destroyed by their being separated from the bonds, nor was the title of one purchasing them without the production of the bonds to which they referred, impaired. 21 How., [U. S.,] 575; 1 Wall, 175; 20 Id., 583; 25 N. Y., 496; 57 Id., 573; 109 Mass., 88. *Myers v. Y. & C. R. R. Co.*, 43 Me., 232; *Jackson v. same*, 48 Id., 147, disapproved.

Also held, That the interest warrants of the D. U. B. & P. R. R. Co. were not within the provisions of 1 R. S., 768, negotiable instruments as between third persons. They were neither promissory notes nor checks nor bills of exchange. 1 Pars. on Bills, 33; 13 Mass., 158; 1 H. Bl., 569; 6 Wend., 637; 4 Id., 575; *Smith v. Clark & Co.*, 54 Mo., 58, and *McCoy v. Wash. Co.*, 3 Wall. Jr., 381, distinguished; and that therefore plaintiff, although a *bona fide* transferee, acquired no title thereto.

Also held, That the coupons of the I. B. & W. R. Co., being promissory notes they had all the characteristics of such instruments and were entitled to the benefit of the days of grace allowable on bills and notes payable at a given day or time.

Judgment of General Term, affirming judgment for plaintiff on report of referee, reversed and new trial granted.

Opinion by *Allen, J.*

CERTIORARI.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

The People, ex rel. Jacob Vander-

poel, *applt.*, v. The Mayor, &c., *respt.*

Decided July 6, 1876.

The records of proceedings in an assessment cannot be reached by certiorari to the Mayor, &c., by one seeking to vacate the same.

Proceedings to vacate should be taken under the statute.

Appeal from order denying application for certiorari.

The relator is the owner of certain property on 5th avenue, New York, on which an assessment for repaving has been laid.

Desiring to vacate this for certain alleged irregularities, he applies as a preliminary step, for a writ of certiorari directed to the Mayor, Aldermen and Commonalty, requesting them to certify and return all papers, &c., relating to this assessment.

A. G. Vanderpoel, for *applt.*

W. C. Whitney, for *respt.*

On appeal.

Held, That the irregularities complained of by the relator are apparently *dehors* the record, and the production of the records of the proceedings concerning the assessment is not necessary therefore to his case for aught that appears.

He complains only of irregularities which are the subject of proof, and which the proceedings referred to would not necessarily disclose. The allowance of the writ of certiorari is not always a matter of right, and in the exercise of a sound discretion should be granted only *ex debito justitiae*, when apparently necessary for the accomplishment of the relief sought (5 Wait's Pr. and cases collated).

Besides, Ch. 338 of act of 1853, and 312 of act of 1874, seem to confine owners of property who seek to vacate

an assessment to the form of proceeding therein disclosed.

Order affirmed.

Opinion by *Brady, J. ; Davis, P.J. and Daniels, J.* concurring.

CIVIL DAMAGE ACT.

N. Y. SUPREME COURT. GEN'L TERM.

FOURTH DEPARTMENT.

Smith, respt., v. Reynolds, applt.

Decided June, 1876.

A wife may maintain an action for loss of support resulting from the death of her husband against a person who sold him liquor &c.

Plaintiff's husband became intoxicated from liquor sold by defendant and was killed by a railroad train.

This action is for damages for loss of support.

On the trial, defendants counsel requested the judge to charge the jury that if they found from the evidence that the liquor delivered to plaintiff's husband was delivered by defendant's bar-keeper without the knowledge of defendant, and after defendant had directed said bar-keeper not to deliver to the deceased any liquor, the plaintiff cannot recover. The court refused to so charge, and defendant's counsel excepted.

There was a judgment for plaintiff.

Carey & Jewell, for respt.

D. H. Bolles, for applt.

Held, A wife may maintain an action for loss of support resulting from the death of her husband against a person who sold him the liquor, &c., &c.

That the refusal of the judge to charge as requested, was correct.

Defendant was liable for the act of the bar-tender even under the facts as stated in the exception and request.

Judgment affirmed.

Opinion by *Mullen, P. J.*

PARTNERSHIP.

N. Y. COURT OF APPEALS.

Mason, respt. v. Partridge, impleaded, &c., applt.

Decided June 6, 1876.

Where one party advances money to another to be used in business under an agreement that they are to share equally in the profits and losses, they are partners as to third persons.

Where there are limitations upon the authority of the active partner to bind the other by debts contracted by him, and the limitations have been disregarded with knowledge of such other, they furnish no defense, even as to those who knew of them.

This action was brought against defendants as partners for goods sold.

It appeared that defendants had entered into an agreement under which defendant P. advanced to defendant W. \$2000, to be used in business. Each was to pay one-half the expenses of the business, and they were to share equally in the profits and losses. P. claimed that W. could not, under the agreement, create any debts binding upon him, and that he could only be made liable to the amount of the \$2000 he put into the business, and that plaintiff knew of these limitations. The evidence showed, and the referee found, these limitations had been disregarded with the knowledge of P.

Wheeler H. Peckham, for applt.

Joseph H. Choate, for respt.

Held, That P. and W. were partners as to third persons; that even as to those dealing with W. who knew the precise relations between W. and P., and the limitations upon W's authority, these limitations having been disregarded with the knowledge of P. they furnished no defense.

Judgment of General Term affirming judgment for plaintiff, affirmed.

Per curiam opinion.

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PATENTS.

U. S. SUPREME COURT.

Joseph Reckendorfer, *applt.* v. Eberhard Faber, *respt.*

Decided May 8, 1876.

The decision of the Commissioner of Patents as to the extent of the utility or importance of an improvement is not conclusive.

A combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a bill filed to restrain the infringement of a patent, and for an accounting and damages.

In 1858 one Lipman obtained a patent for a combined pencil and eraser, the combination, which he claimed as an invention, consisting of the insertion of a piece of india rubber in the body of the pencil for one-fourth of its length.

This patent was extended for seven years on the 30th day of March, 1872.

In 1862 plaintiff obtained a patent for an improvement upon Lipman's invention, which consisted of a tapering pencil with one end enlarged or recessed to constitute a receptacle for the eraser.

The court below dismissed the bill.

The plaintiff contends that the decision of the Commissioner is conclusive upon the point of invention, and that the question, as distinct from that of want of novelty, is one not open to the judgment of the court.

Held, That the proposition is unsound. It is nowhere declared in the statute that the decision of the Commissioner as to the extent of the utility or importance of the improvement shall be conclusive upon that point, but it is placed in the same category with the want of novelty and the other requisites of the statute, and it is expressly conceded by the appellant that the judgment of the Commissioner on the question of novelty is not conclusive, but that that point is open to examination. On that subject the practice of the courts is uniform in holding it to be subject to enquiry.

The plaintiff's counsel, in his brief, put his argument in this form: "The commissioner, then, passes on these questions. "1. Did the applicant himself make the invention? This question is settled by his oath." This is true to the extent and for the purpose of issuing a patent, and to this extent only. When the patentee seeks to enforce his patent he is liable to be defeated by proof that he did not make the invention. The judgment of the commissioner does not protect him against the effect of such evidence. "2." (The counsel says), "Was the invention new? This question is solved by the examination required by the act." To the same extent only. The defense of want of novelty is set up every day in the courts, and is determined by the court or jury as a question of fact upon the evidence produced, and not upon the certificate of the commissioner. "3." (The counsel says again) "Is the invention sufficiently useful and important? This the commissioner settles for himself by the use of his own judgment. It is a question of official judgment." These questions are all ques-

tions of official judgment, and are all settled by the judgment of the commissioner. His judgment goes to the same extent upon each question. He determines and decides for the purpose of issuing or refusing a patent. When the patent is sought to be enforced, the questions, and each of them, are open to judicial examination. We see many reasons why all the questions of invention, novelty, and prior use should be open to examination in each case, and such we believe to be the course of the authorities and practice of the courts. 11 How. 248; 10 Wall. 117; 20 Id. 353; 20 Id. 498; 21 Id. 115; 18 Id. 670; 11 Id. 516.

His decision in the allowance and issuance of a patent creates a *prima facie* right only, and upon all the questions involved therein, the validity of the patent is subject to an examination by the courts.

Also held, That neither the patent of Lipman nor the improvement of Reckendorfer can be sustained.

The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, or of the order in which they are used, to give patentability. Curtis on Pat., § 50; Hailes v. Van Wormer, 20 Wall. 353.

A double use is not patentable, nor does its cheapness make it so. (Curtis, §§ 56, 73).

An instrument or manufacture which is the result of mechanical skill merely, is not patentable. Mechanical skill is one thing. Invention is a different thing. Perfection of workmanship, however much it may increase the convenience, extend the use, or diminish expense, is not patentable. The distinction between mechanical skill, with its conveniences and advantages and inventive genius, is recognized in all the

cases. Rubber Tip P. Co. v. Howard, and other cases, sup.; Curtis, § 72, b.

The combination to be patentable must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements.

In the case we are considering the parts claimed to make a combination are distinct and disconnected. There is no new result not only, but there is no joint operation. When the lead is used it performs the same operation and in the same manner as it would do if there were no rubber at the other end of the pencil. When the rubber is used it is in the same manner and performs the same duty as if the lead were not in same pencil. A pencil is laid down and a rubber is taken up, the one to write, the other to erase; a pencil is turned over to erase with, or an eraser is turned over to write with. The principle is the same in both instances. It may be more convenient to have the two instruments on one rod than on two. There may be a security against the absence of the tools of an artist or mechanic from the fact that the greater the number the greater the danger of loss. It may be more convenient to turn over the different ends of the same stick than to lay down one stick and take up another. This, however, is not invention within the patent law, as the authorities cited fully show. There is no relation between the instruments in the performance of their several functions, and no reciprocal action, no parts used in common.

Judgment of Circuit Court, dismissing bill of complaint, affirmed.

Opinion by *Hunt, J.; Strong, J.*, dissents from so much as holds that the instrument or manufacture described in the patents exhibits no invention to warrant the grant of a patent for it.

PRACTICE. INSTRUCTION BY COURT. JURY.

N. Y. SUPREME COURT. GENERAL TERM
FOURTH DEPARTMENT.

Burke, respt. v. Webb, applt.

Decided June, 1876.

After a jury has retired, the court, in absence of the counsel for either party, cannot instruct the jury on any point material to the issue.

This action was brought to recover wages for a year upon a special contract between the parties, the term to commence April, 1874.

The plaintiff worked for defendant for some months when, as he claims, defendant discharged him without cause.

After the jury had retired they returned and desired to know of the court whether plaintiff could recover for his services in another action, provided they found for defendant in this action. Neither plaintiff's attorney or plaintiff were present at this time.

The court, in answer to this question, told the jury, he (plaintiff) could recover in another action.

Soon after plaintiff's counsel returned and excepted to this instruction to the jury. The jury found for the defendant.

Subsequently, on motion, such verdict and judgment were set aside, and a new trial ordered.

From this order this appeal is taken.

W. E. Hughitt, for applt.

W. Porter, for respt.

Held, That when in the absence of

either party the court, after a jury has retired, gives the many instruction or information in any way affecting the merits of the case, the judgment will be set aside.

That it is not to be tolerated that a jury can be allowed to render a verdict in favor of one of the parties, provided the court shall answer a question relating to the action but not affecting the merits in a specified way. That to tolerate such practice would tend to base verdicts of juries more on chance and guess than on deliberate and careful examination of the facts.

The question whether plaintiff could in a new action recover for his wages was one with which the jury had nothing to do.

Order granting new trial affirmed.

Opinion by *Mullin, P. J.*

EXONERATING BAIL.

N. Y. SUPREME COURT. GEN'L TERM,
FIRST DEPARTMENT.

Robert A. Mills, respt. v. Henry Rodewald, applt.

Same *respt. v. David M. Hildreth*, impleaded, &c., *applt.*

Decided May 1, 1876.

When bail is indemnified an application to the favor of the court for leave to surrender principal should not be granted.

Appeal from order denying defendant's (who is bail) application to surrender his principal, Henry Rodewald.

In 1869 plaintiff sued Henry Rodewald, at the same time arresting him. Hildreth and one Stubbens went upon his bail-bond. After obtaining judgment and issuing executions against the property and person of Rodewald, both of which were returned unsatisfied, this action was brought against the sureties on the bail.

Hildreth now makes application to be allowed to surrender his principal, and to be exonerated from further liability as bail. It appearing that he had been indemnified by Rodewald's wife, his application was denied.

Thos. Bracken, for respt.

Geo. C. Genet, for appls.

On appeal.

Held, That where bail are indemnified and leave to surrender, if granted at all, can only be as a favor, the application should be denied.

In this case the rule should be applied, because the wife of the principal has indemnified the bail, and the plaintiff therefore has the superior equities.

It is true that it does not appear affirmatively that the wife is responsible, but it was the duty of the bail to have shown, with reasonable certainty, her inability to meet the indemnity assumed when the obligation was given.

Order affirmed.

Opinion by *Brady, J.*; *Davis, P. J.*, and *Daniels, J.*, concurring.

RAILROAD COMPANIES. DAMAGES. RESISTANCE.

N. Y. COURT OF APPEALS.

English, *respt.*, v. The President, &c., of the D. & H. C. Co., *appls.*

Decided June 20, 1876.

Where a conductor attempts to eject a passenger from the train for refusing to pay his fare a second time, the passenger has a right to protect himself against any such attempt, and may resist to such extent as may be necessary to maintain such right.

The train being in motion, the passenger is justified in repelling any attempt to eject him which would endanger his life or subject him to great hazard and peril, and his resistance cannot be urged against his right to recover damages for injuries sustained through such ejection.

This action was brought to recover damages for injuries alleged to have been received by plaintiff by being removed from one of defendants' cars. It appeared that plaintiff had paid his fare, and that it being demanded a second time, he refused to pay it, and that defendants' conductor thereupon violently ejected him from the car, plaintiff meanwhile resisting. Defendants' counsel requested the court to charge that, even if the conductor had no right to remove plaintiff from the car, if he resisted to such an extent that extraordinary force became necessary to remove, and he was injured thereby, he could not recover for such injury. The court charged in response to this, that if plaintiff was lawfully there he had a right to resist the conductor in removing him, and his resistance could not be urged against his right to recover damages.

J. G. Runkle, for appls.

O. W. Chapman, for respt.

Held, No error; that when a conductor is in the wrong, the passenger has a right to protect himself against any attempt to remove him, and resistance can lawfully be made to such an extent as may be essential to maintain such a right.

Defendants' counsel also requested the court to charge the jury, that if they found that plaintiff resisted when being put off the train more than was necessary to protect his legal rights, and to avail himself of his legal remedy for a breach of the contract on the part of the defendants, and was thereby injured, he could not recover. This request was refused. The evidence showed that he did not resist enough to retain his position on the cars, and it did not distinctly appear that he resist-

ed beyond what was necessary for that purpose, or that he received any injury by resisting. There was also evidence showing that the train was in motion at the time.

Held, That under the circumstances, it was questionable whether the request to charge was applicable, that if it was, it was sufficiently covered by the charge already made; that if the train was in motion, the law of self-preservation justified plaintiff in repelling any attempt to eject him which would endanger his life or subject him to great hazard and peril. 23 N. Y., 343. *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y., 295, distinguished.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Miller, J.*

EVIDENCE. PRACTICE.

SUPREME COURT OF ILLINOIS.

Nicholas Berdell, *applt.* v. Catharine Berdell, *respt.*

Decided June 30, 1876.

In an action for divorce on the ground of cruelty, bruises and marks observed and sworn to by witnesses are competent testimony in confirmation of the evidence given by the complainant.

It is the province of the jury to reconcile the conflict of proof, and determine from all the evidence whether the truth is on the side of the complainant or of the defendant; and when this has been done, free from passion and prejudice, and the record contains evidence sufficient to sustain or justify the result, the verdict must be regarded as final.

Evidence of complainant's good character, her character not being at issue, is inadmissible.

This was a bill for divorce brought by Catharine Berdell against Nicholas Berdell, her husband.

The bill charges the defendant with acts of extreme and repeated cruelty inflicted upon the person of the complainant, and also alleges desertion for the space of two years.

To the bill the defendant put in an answer in which he denied each and every charge therein contained. He also filed a cross bill, in which he charged the complainant with desertion, without cause, for more than two years, upon which ground he prayed for a divorce. To the cross-bill the complainant put in an answer denying the charges therein contained. Replications having been filed, a trial on both bill and cross-bill was had before a jury, which resulted in a verdict in favor of the complainant in each of the cases presented by her bill, and against the defendant on the cross-bill. The court, on motion, set aside the finding in the charge of desertion, but sustained the verdict as to extreme and repeated cruelty. A decree was therefore rendered dissolving the marriage and dismissing the cross-bill; to reverse which this appeal has been brought by the defendant in the original bill.

The complainant and defendant were married in 1855, and resided together in Cook county until 1861, when the wife left the home of her husband, and they have not since resided together.

The complainant claims that the cause of her leaving was on account of repeated acts of personal violence received from her husband; while, on the other hand, it is claimed she was well treated, and deserted her husband of her own accord, and not through any improper treatment on his part.

The complainant, in her evidence, testifies to numerous acts of personal violence on the part of her husband, which were unjustifiable and without

cause or provocation; and, if her evidence be true, there can be no doubt but a clear case of divorce was established. But, independent of her evidence, on several occasions the marks of violence were discovered on her person by her neighbors; often she complained of having received blows from her husband.

Held, That while this character of evidence is not as satisfactory as if witnesses had been produced who saw the blows given, yet the bruises and marks observed and sworn to were competent testimony in confirmation of the evidence given by the complainant.

It was also proven, that on two occasions, when the complainant returned to the house of the defendant, he allowed her to be assaulted in his presence; and in his own house, on one occasion, as the evidence shows, pushed down stairs; and on another, her hair was torn from her head, and her clothing badly injured by an inmate of the house, while, as one witness testifies, the defendant held the complainant so she could not defend herself.

The defendant, in his evidence positively denied every and all acts of violence, and said that he never in any manner mistreated or abused the complainant, and testified to misconduct on her part, and introduced other evidence tending to establish the truth of his own.

Held, That it was the peculiar province of the jury to reconcile the conflict of the proof, and determine from all the evidence whether the truth was on the side of the complainant or the defendant; and when this has been done, free from passion or prejudice, and the record contains evidence sufficient to sustain or justify the finding, the result of the verdict must be regarded

final. As was said (*Coursey v. Coursey*, 60 Ill. 186) the jury had the witnesses before them, and have passed upon the weight of evidence.

It is, however, argued that the court erred in permitting the complainant to introduce evidence of good character in the neighborhood where she resided.

Held, error. That while it is true the defendant introduced, on the trial, evidence of specific acts of the complainant tending to reflect upon her character for sobriety and modest, peaceable behavior, yet, under the rule announced by *Starkie*, we do not understand that she had the right to rebut by proof of general good character. Her general good character was not in issue. But it was "of no intrinsic strength or weight;" and for that very reason it could do the defendant no harm.

Decree affirmed.

Opinion by *Craig, J.*

CONSIDERATION.

N. Y. SUPREME COURT. GENERAL TERM,
FOURTH DEPARTMENT.

George F. Barton, *respt.* v. Shelby
A. Harrington et al., *appls.*

Decided April, 1876.

The trouble and expense to which a party is subjected in following the directions of a contractor in respect to the time and place of filing his claim against a sub-contractor, is a sufficient consideration to support a promise on the part of the contractor to pay the debt of the sub-contractor.

This action was commenced in a justice's court.

The plaintiff had judgment and there was an appeal to the county court, a new trial had, and judgment for the plaintiff.

The defendants appeal to this court. The defendants made a contract to

build a railroad and sublet a portion of the work to others, who employed the plaintiff to labor for them. The plaintiff, before his pay was due, presented his claims for wages at the defendants' office, and was told by the person in charge, one of the defendants, that the claim was all right and if he wished to have him or the contractors holden for the same he should take the papers to Naples and have them filed in the company's office. That the company, defendants, were good for the debt, and will pay every dollar of it when due, on the 15th of February.

The plaintiff did as directed.

Briggs & Knox, for resp't.

E. B. Potter, for applt.

Held, That the promise of the defendant was a new one, formed on a new and independent consideration.

The judgment of the county court was right, and must be affirmed.

Opinion by *Mullin, P. J.*

POWER OF COURT. APPEAL.

N. Y. COURT OF APPEALS.

Platt et al., ex'rs., &c., *resp'ts.* v. Platt, *applt.*

Decided June 6, 1876.

Rents paid into court on application of plaintiffs and by consent of defendant, are subject to its control and discretion, and the court has power, in the exercise of its discretion, to award that they be paid over to the party to whom the judgment gave a right to them, subject to the rights of the other party.

An order which, though involving a substantial right, is discretionary, is not appealable.

This is an appeal by defendant from an order of the General Term affirming an order of Special Term, directing

the Union Trust Company, as receiver, to pay over to plaintiffs an accumulation of rents in its custody before any final judgment in the action as to the rights of the parties, on their undertaking to repay the same into court if so ordered.

The rents were collected from property to which defendant, when the action was commenced, had the legal title. His title thereto had been set aside and his rights reduced to those of a mortgagee in possession. An accounting directed by the decision is now progressing.

The Union Trust Company had been appointed receiver of the rents and profits of the property on plaintiff's motion, defendant consenting.

Stephen P. Nash, for applt.

Wm. R. Martin, for resp'ts.

Held, That the rents disposed of by the order, having been paid into court by consent of defendant, were subject to its control and direction, and it therefore rested in the power of the court to determine what disposition should be made of them pending the accounting. It had power to make plaintiffs receiver of the fund instead of the receiver originally appointed, and, in the exercise of its discretion, to award that they be paid over to the party to whom the judgment gave a right to them, subject to the defendant's equitable rights upon such terms as might be proper under the circumstances.

That even if the order involved a substantial right it was, notwithstanding, discretionary, and was therefore not appealable. 59 N. Y. 315.

Appeal dismissed.

Per curiam opinion.

MANDAMUS.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Matter of Hebra Hased Va Emet.

Decided May 1, 1876.

To remove a duly elected officer of a society, because of alleged ineligibility, the proper mode of proceeding is by quo warranto, and not by mandamus to compel a new election.

Appeal from order of Special Term denying motion for mandamus. The Hebra Hased Va Emet (Society of Mercy and Truth) is a benevolent organization, whose object is the "securing and performance of the rites and ceremonies practiced among Israelites as respects the dead." By the By-Laws of the society, "any seat-holder in the congregation 'Shearith Israel,' not married contrary to the religious laws of Israelites, may be elected a member of the society," but that any violating such laws of marriage, or discontinuing their seats in the synagogue should forfeit their membership. The officers, including the Secretary, were to be elected from among the members, on the first Sunday of the Jewish month *Tebeth*, but if no election then took place, the old officers were to remain in office, until an election should be had some time in that month.

Isaac Hendricks held the office of Secretary during the past year, and at the election for this year, was re-elected. Some days prior to this election he had discontinued his seat in the synagogue "Shearith Israel," though he still remained a member thereof, and he was not dismissed from the society Hebra, &c. Certain members of this society, claiming that by reason of his discontinuing his seat in the synagogue, he was no longer a member of

the society, was not eligible to office, and that his election was therefore a nullity, called upon the President to convene a meeting of the society for a new election of Secretary. He declined to comply. They then applied to this court for a writ of mandamus to compel such an election.

Gratz Nathan, for applt.

Adolph L. Sanger, for resp't.

On appeal.

Held, That the writ was properly denied. It was not the proper remedy for the alleged wrong. The opinion of the court below, which we adopt, sets forth the reason clearly, as follows, viz.:

That it is a case of plenarty, and the only mode of proceeding is by *quo warranto* (34 Eng. L. & E. 59; 7 Ad. & E. 215).

The charter of the society does not in terms declare the election of an unqualified person void, and that is the test (1 M. & S., 76; 2 Burr., 1,016). Hence Mr. Hendricks fills the office *de facto*, until ousted by judgment at the suit of the People, (6 Cow., 23). We are here asked, without hearing the party to be affected, to adjudge that he is neither member nor officer, for the mandamus could not in any event issue, unless the court was prepared to say that both of these questions were entirely free from doubt.

Mandamus denied.

Order of the Special Term affirmed.

Opinion by *Davis, P. J.*; *Brady and Daniels, JJ.*, concurring.

LIFE INSURANCE. . WAIVER.

N. Y. COURT OF APPEALS.

Merserau, admrx. &c., resp't., v. The Phoenix Mutual Life Ins. Co., applt.

Decided May 30, 1876.

Insurance companies doing business by agencies are responsible for the acts of an agent within the general scope of the business in his charge, and no limitation of his authority will be binding on parties with whom he deals which are not brought to their knowledge.

But where insured has knowledge of the limitation of the agent's authority, he is estopped from claiming that the agent could contract with him so as to change the terms of the policy or waive performance of its conditions.

This action was brought upon a policy of life insurance. The defense interposed was the non-payment of the semi-annual premium, due August 31, 1872. By the terms of the policy, the liability of the insurer ceased upon the failure of the insured to pay the renewal premiums at the office of the company, at Hartford, Conn., or to an agent of the company on his producing a receipt signed by the President or Secretary on or before the days at which they were payable. Plaintiff proved that in July, 1872, the insured saw W., defendant's agent at Hudson, N. Y., and offered to pay the premium to become due Aug. 31, 1872, that W. declined to receive the money because he had not the company's receipt, and told the insured that he would keep him good with the company. W. was defendant's local agent at Hudson, and was authorized to solicit insurance, receive and forward applications to the general managers at Albany, and on receipt of the policy, to deliver it and collect the premiums and renewal premiums, when he had the receipt of the company, and upon delivery of the same to the insured. The policy contained a notice to the effect that the agent was only entitled to receive the semi annual renewal premiums upon

previously and regularly signed receipts. The judge left it to the jury to say whether there had been a waiver of payment of the premium.

Samuel Hand, for applt.

R. E. Andrews, for respt.

Held, (*Church, Ch. J., Andrews and Miller, JJ.*, dissenting), error. That the authority of the agent being limited as to the receipt of the renewal premiums, and this being known to the insured, he was estopped from claiming that W. could, as agent of defendant, contract with him so as to change the terms of the policy or dispense with the performance of its conditions; that to establish a waiver, evidence was necessary to justify the belief that the company, by direct authority, enlarged the agent's powers or knowingly permitted him to act for it beyond the scope of the power originally conferred. 33 N. J., 487; 25 Conn. 542.

Also held, That insurance companies, doing business by agencies, are responsible for the acts of the agent, within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge. 20 Wall., 560; 51 N. Y., 117; 26 Id., 460; 57 Barb., 519; 10 Abb. (N. S.), 166.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed and new trial granted.

Opinion by *Allen, J.*

COMMON CARRIER. AGENT.

N. Y. SUPREME COURT. GEN'L TERM.
FOURTH DEPARTMENT.

Armstrong, applt. v. American Express Company, respt.

Decided June, 1876.

An agent of an express company may receipt for goods, and such agent's signature may be proved by some one who, in regular course of business, has received such receipts and knows such agent's hand-writing.

Appeal from an order granting a new trial to defendant.

On the trial defendant offered to prove a delivery of the property in suit to the Adams Express Company and to show such delivery called a witness who, on a receipt of the Adams Express Company being offered by defendant, swore he knew the clerk signing the receipt, had never seen him write, but had seen a large number of receipts signed by him for property delivered to other express companies, and from the knowledge thus acquired, he believed it to be the agent's (of the Adams Express Company) signature.

To this proof plaintiff objected.

P. C. Williams, for applt.

Wynn & Porter, for resp't.

Held, That the proof offered was sufficient of the due execution of the receipt. That in such cases proof of hand-writing and that witness has seen person signing such receipt not necessary.

Order affirmed.

Opinion by *Mullin, P. J.*

RAILROAD COMPANY. NEGLIGENCE.

N. Y. COURT OF APPEALS.

Mitchell, admr., &c., applt. v. The N. Y. C. & H. R. R. R. Company, resp't.

Decided April 4, 1876.

Where a person is killed while walking over a railroad crossing in the day-time, there being nothing to obstruct the view of the track, and it does not appear that there was anything

to distract her attention, Held, that she was guilty of contributory negligence.

The same degree of care is not required of one driving a team across a railroad crossing as of one crossing on foot.

This action was brought to recover damages for the killing of plaintiff's intestate while crossing one of defendant's tracks at their intersection with Broadway in the village of Greenbush.

It appeared that the deceased was walking northerly on the east side of Broadway. The tracks, three in number, cross that street in a northwesterly direction.

Upon the first track some box-cars were standing partly across the street, and obstructing the view of the deceased towards the north and east; the second track, which was distant six feet from the first was clear, and the third was twenty feet from the second. At this time an engine, with five box-cars, was coming from the south upon the third track. About 300 feet southeasterly of Broadway there was a switch, and there the train made a running switch, the engine passing on and the cars running off on the second track.

After the deceased passed the first track there was nothing to obstruct her view of the second and third tracks. She passed the second track before the cars from which the engine had been switched, passed. As she stepped upon the third track she was struck by the engine and killed.

The accident happened in the day-time, and there did not appear to have been anything to distract her attention; no train was coming from an opposite direction.

A motion was made for a non-suit, which was granted.

Amasa J. Parker, for applt.

Ezek Cowen, for respt.

Held, no error. That the deceased was guilty of contributory negligence. 20 N. Y. 66; 58 Id. 248; 47 Id. 400; 39 Id. 358.

Also held, That the same degree of care is not required of one driving a team across a railroad crossing as of one crossing on foot.

Judgment of General Term, affirming judgment of non-suit, affirmed.

Opinion by *Earl, J.*

PRACTICE.

N. Y. SUPREME COURT. GEN'L TERM,
FOURTH DEPARTMENT.

Hallenbeck, respt. v. Phelps et al., appls.

Decided June, 1876.

Where a complaint and bill of particulars is served setting up certain items, a referee cannot render a judgment on another and different claim when the complaint is not amended or no notice given of any claim on such new item.

Plaintiff sued to recover for certain items for labor and services, and had served a bill of particulars of his claim.

The answer denied most of such items, set up payment, &c.

Just before the close of the evidence plaintiff was recalled as a witness in his own behalf, and testified as to a certain order of \$150, which he claimed defendants had accepted, and which was not set up in the complaint or bill of particulars. No objection was made to the reception of this evidence nor any suggestion made that plaintiff intended to insist upon the right to recover upon such order.

The referee, in his report, finds that the work, &c., set up in the complaint

and bill of particulars was fully paid but ordered judgment for plaintiff for the amount of the order.

J. F. Seymour, for appls.

O. S. Williams, for respt.

Held, That in order to entitle plaintiff to recover under the circumstances of this case for this order, he should either have amended his complaint or in some way given defendant notice of his intention to seek a recovery upon it.

The fact that defendants did not object to the reception of the evidence made no difference. Plaintiff was bound by the items set out in his complaint and bill of particulars.

Judgment reversed.

Opinion by *Mullin, P. J.*

MORTGAGE. USURY.

SUPREME COURT OF OHIO.

Philip Cramer, v. Peter Lepper (not yet reported).

A party who purchases land subject to a mortgage which he is to pay as a part of the purchase price, is the purchaser of the equity of redemption merely, and cannot set up as a defense that the note secured by the mortgage was usurious.

There being no agreement as to the rate of interest upon accrued interest, it will be computed at six per cent.

Motion for leave to file a petition in error to the District Court of Summit County.

On the 25th of February, 1868, C. executed his note to one T. for \$2,500, payable five years after date, with interest at the rate of ten per cent. per annum, payable annually; and executed a mortgage on certain real estate in Summit County to secure the same.

On the 1st of April, C. executed and delivered to L. a deed of said property, in pursuance of a contract to sell the

same, in which he covenanted that the premises were free and clear of all incumbrances except a mortgage claim of T. for \$2,500 which L. was to pay to T.

From time to time afterwards and until March 12th, 1874, L. paid to T. divers sums on his mortgage.

On the 25th of April, 1874, T. brought an action in the Court of Common Pleas of Summit Co. against C. and L. to enforce his lien for the balance due on the note, including interest at the rate specified. L. resisted so much of the claim as was usurious.

The court found the balance due, including interest at the rate of ten per cent., to be \$1,402.50, and decreed, upon failure of payment at a short day, the sale of the mortgaged premises.

Upon further proceedings, the court decreed that as between themselves C. was bound to pay T. the sum of \$275.20 and L. the balance, to wit, \$1,126.80.

On petition in error to the District Court, by L. it was claimed that the Common Pleas erred in holding that L. was bound by his contract to pay more than \$2,500, and interest at six per cent., from April 1, 1869, and in not holding that C. was liable for interest on said sum of \$275.20 from the same date. The District Court reversed the judgment of the Common Pleas, and this proceeding is to obtain a reversal of the judgment of the District Court.

Held, That as between T., the mortgagee, and L., the grantee of the mortgagor, the latter must be regarded as purchaser of the equity of redemption merely, and as such he had no right to set up by way of defense that the note secured by the mortgage was usurious; that the defense of usury in such a case is personal to the mortgagor, and if waived by him cannot be set up his

grantee, who assumes, in consideration of the grant, to pay the mortgage. *Union Bank v. Bell*, 14 Ohio St., 201; *Green v. Kemp*, 13 Mass., 515; *Shufelt v. Shufelt*, 9 Paige, 137; *Morris v. Floyd*, 5 Barb., 130.

That as between C. and L. the Court of Common Pleas rightly construed their contract in holding C. to the payment of the interest which had accrued prior to the date of the conveyance.

But that the Court of Common Pleas erred in not charging C. with interest on the sum decreed against him from the date of the conveyance to the date of the decree. The rate of such accruing interest was six per cent., there being no agreement as to the rate of interest upon accrued interest.

Motion overruled.

Per curiam opinion.

ATTACHMENTS. DISSOLUTION OF CORPORATION.

N. Y. SUPREME COURT. GEN. TERM.
FOURTH DEPARTMENT.

Chamberlain, applt., v. The Rochester Seamless Paper Vessel Co., respt.

Decided April, 1876.

Proceedings under the statute for the voluntary dissolution of a corporation must conform strictly to the statute.

The appointment of a receiver in the proceedings, of the property of the corporation, before the report of the referee appointed under the order, was irregular and in no way vested property in receiver or prevented creditors from pursuing their ordinary remedies.

Appeal from order setting aside attachments, executions, &c.

Defendant was a corporation, and plaintiff had procured judgment against it, and had issued an execution and

had levied attachments on property on the ground that defendant had made an assignment of its property, &c.

Proceedings had been commenced for a voluntary dissolution of the corporation, and a referee had been appointed, before whom there was to be a hearing, and the notice required by statute had been duly published. Before hearing before the referee, and before his report, a receiver was appointed by the court and by order vested with the title to all the property, and gave the bond required by statute. After this the order setting aside plaintiff's execution and attachment was made on the ground that the property was in receiver.

Held, That the appointment of the receiver before hearing before the referee, was irregular, and no property vested in him, and that his appointment in no way interfered with the rights of creditors to pursue their ordinary legal remedies. The proceeding was not an action, and the court had no right to appoint a receiver except in conformity to the statute. There is no restriction in the statute on creditors pursuing all their remedies up to the regular appointment of receiver, and the appointment in this case was irregular.

Order reversed.

Opinion by *Smith, J.*

PATENTS. JURISDICTION.

N. Y. COURT OF APPEALS.

De Witt, applt., v. Elmira Nobles Mfg. Co., respt.

Decided June 20, 1876.

The United States courts have exclusive jurisdiction of an action for the infringement of a patent.

State courts have jurisdiction in actions in which patent rights come in question collaterally.

Where a license has been given by one or more of several owners in common of letters patent, the remedy of the others is by action for an account for whatever has been received.

This action was brought by plaintiff, who was the owner of an undivided interest in a patent, to recover for the use of it by defendant without the consent, license or permission of plaintiff. Defendant demurred.

E. P. Hart, for applt.

P. Dexter, for respt.

Held, That the action being simply for the infringement of a patent and for damages, that the United States courts had exclusive jurisdiction of it and it could not be maintained in the State courts, 37 N. Y., 119; 3 Com., 9, and that the demurrer was properly sustained.

The State courts will entertain jurisdiction of actions upon contract and other actions in which patent rights come in question collaterally. 47 N. Y., 443, 662.

The license of one or more of several owners in common of letters patent confers a right as against all, and the remedy of the other tenants in common is by action for an account for whatever may have been received by them. 2 Curtis, 506; L. R. 1 Ch. Ap. 29. *Pitts v. Hall*, 3 Blatch., 201, distinguished.

Judgment of General Term, affirming order of Special Term sustaining demurrer to the complaint, affirmed.

Opinion by *Allen, J.*

AMENDING PLEADINGS.

N. Y. SUPREME COURT. GEN'L TERM, FIRST DEPT.

Mathias Bradley, applt. v. Michael Sheehy, respt.

Decided May 26, 1876.

Where plaintiff delays for several years after issue joined, in bringing his cause to trial, such delay will not prevent defendant amending his answer.

Appeal from order allowing an amendment of defendant's answer.

Plaintiff brings this action for the specific performance of a contract, and for damages for its non-performance.

It appears that the defendant employed an auctioneer to sell certain lots of land under definite instructions. At the sale, plaintiff bought in the lots, but defendant claiming that the auctioneer had violated and exceeded his instructions, refused to execute the necessary deeds.

This action was commenced in May, 1869. In September, 1870, judgment by default was entered on the report of a referee. This was afterwards opened, on terms, and defendant allowed to answer, issue being as of September 27, 1870.

Nothing further appears to have been done in the matter until April, 1875 when the cause was placed on the Special Term calendar. When reached the cause was postponed, plaintiff not being ready, and on condition that plaintiff consent to refer it.

Defendant in his first answer admitted that the lots were put up for sale, but denied that plaintiff purchased them.

Fearing that that form of an answer would not raise, as an issue, the auctioneer's alleged transgression of authority, defendant now seeks to amend by putting that fact clearly in issue.

Plaintiff opposes this application on the ground of defendant's intentional laches, and for the further reason that if defendant succeeds in establishing that defence, plaintiff will now have no remedy against the auctioneer because

of the statute of limitations, and the fact that he has since died.

A. Cardozo, for applt.

S. Jones, for respt.

On appeal.

Held, That plaintiff bases his opposition principally on defendant's alleged laches, but as the delay seems to have resulted from the mutual indisposition of both parties to proceed, plaintiff's objection loses its force.

The action was practically suspended during several years, a part of the time in the hope that a settlement might be effected. During this delay, by reason of the auctioneer's death and the statute of limitations, plaintiff has lost whatever remedy he might have had against him for entering into an unauthorized contract, but this loss is so clearly attributable to plaintiff's own neglect in the prosecution of his action that the defendant should not, on that account, be deprived of his amendment.

No reason appears in the papers for the supposition that defendant intentionally delayed making this application after its propriety was discovered.

Order affirmed.

Opinion by *Daniels, J.*; *Davis, P. J.*, and *Brady, J.*, concurring.

STATUTE OF LIMITATIONS.

N. Y. COURT OF APPEALS.

Smith, survivor, &c., applt., v. Ryan, respt.

Decided June 6, 1876.

Where notes are transferred by indorsement, in part payment of a debt, payment of the notes at maturity by the makers does not operate as an acknowledgment of the residue of the indebtedness, they not being the authorized agents of the debtor.
There is no agency between several joint

debtors or between principal and surety or an insolvent debtor and his assignees which will make a payment by one evidence of an acknowledgement of the debt by the others so as to revive it.

The delivery of notes in part payment operates only as of the day of delivery to take the case out of the statute.

This action was to recover a balance of an account for goods sold, &c., for which defendant was indebted April 10, 1868. The defense was the statute of limitations. On April 14, 1868, defendant indorsed and delivered to the plaintiffs two notes for \$500 each, made by B. & G., dated April 6, 1868, and payable in two and five months, with interest. The notes were secured by a chattel mortgage made to defendant, which he assigned to plaintiffs. The notes were paid upon their maturity to plaintiffs' firm, and were credited to defendant's account on their books, \$500 on June 9, 1868, and \$500 Sept. 17, 1868. This action was commenced June 5, 1874.

Samuel Hand, for aplt.

Jas. B. Lockwood, for resp't.

Held, That the delivery of the notes to plaintiff operated only as of the day of their delivery to take the case out of the statute of limitations. 3 B. & Ad., 507.

That the payments of the notes by the makers at their maturity did not operate as an acknowledgement of the residue of the account, as they were not the authorized agents of defendant. 53 N. Y., 442; 2 Lans., 120; 49 N. Y., 155; 7 Wend., 408; 20 Me., 315; 5 Pick., 54. No such acknowledgment or promise by defendant could be implied therefrom.

Also held, That there is no agency as between several joint debtors or between principal and surety, or an in-

solvent debtor and his assignees which will make a payment by one evidence of an acknowledgement of the debt by the other so as to revive it. 2 Comst., 523; 1 Kern., 176; 18 N. Y., 558; 34 Id., 175.

Whipple v. Blackington, 97 Mass., 476, distinguished.

Order of General Term, reversing judgment of Special Term for plaintiff, affirmed.

Opinion by *Allen, J.*

ARREST.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

The Meriden Malleable Iron Company, *resp't.* v. Charles J. Baudman,
Decided July 6, 1876.

To sustain an order of arrest the affidavit upon which it is founded must set forth the facts upon which the conclusions are based.

Appeal from order denying motion to discharge order of arrest.

The motion was made upon the assumed insufficiency of the affidavit on which the order of arrest was granted. The allegations in relation to the fraud are as follows:

"That prior to the 6th day of March, 1875, this defendant applied to this deponent as an officer of the plaintiff, to furnish him certain goods, and as an inducement to the plaintiff to sell the said goods, well knowing the representations to be false and untrue, and, that he was insolvent and utterly unable to pay his debts, represented falsely and fraudulently that he was the owner, in his own right, of real estate worth \$50,000, clear and unencumbered, excepting to the extent of five thousand dollars.

"That said plaintiff sold said goods upon the faith of said representations,

and believing the same to be true and relying thereon.

"That this deponent has only recently learned that said representations are false and untrue."

L. Lofton Kellogg, for resp't.

J. Henry McCarthy, for appl't.

Held, The affidavit is defective because the facts are not set forth on which the conclusions stated in it are founded, and which form the basis of the proceeding. In other words the affidavit contains recitals in effect and not facts in detail.

Order appealed from reversed, with \$10 costs and disbursements to abide event.

Opinion by *Brady, J.*

COMMON CARRIERS. LIABILITY.

SUPREME COURT OF KANSAS.

Leavenworth, Lawrence and Galveston R. R., plff. in error v. Maris, def't. in error.

A carrier's liability continues until the consignee has had a reasonable time to call for, examine, and remove the goods.

A reasonable time is such as would enable one living in the vicinity, in the ordinary course of business, and in the usual hours of business, to inspect and remove them.

Where it is agreed that notice of arrival shall be given the consignee, the reasonable time runs from the date of receipt of such notice, unless it contains a stipulation that the liability of the carrier shall cease on the arrival of the goods.

This was an action brought by defendant in error to recover for goods destroyed by fire in a depot belonging to plaintiff in error.

Defendant in error was a merchant at Winfield, a place about ninety miles

from the company's office at Independence, where the goods were to be delivered to him. They reached Independence on the 4th and 7th of January, 1872, and notice was immediately thereafter given by mail as per special agreement. The notice contained the following clause:

"The contract of this company as common carriers ends upon the arrival of goods at our depots."

This notice did not reach defendant until the 20th of January. The fire took place on the 15th.

It was claimed that a common carrier is relieved of its extraordinary liability as an insurer when it has carried the goods intrusted to it safely and deposited them in a safe warehouse.

Held, That the company's liability as carrier had terminated before the fire, and that therefore it was not responsible for the destruction of the goods; that the carrier's liability continues until the consignee has had a reasonable time to call for, examine, and remove the goods; but that such reasonable time is not a time varying with the distance, convenience, or necessities of the consignee, but is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods. 18 Minn. 133.

It was insisted, however, that notice was required of their arrival, and that no notice was received until after their destruction.

Held, That whether independent of the contract any notice was requisite, may be doubted. See 34 N. Y. 497; 44 N. Y. 505; 3 N. Y. 322; 42 Ill. 133; 18 Minn. 133; 16 Mich. 79, and 6 Jones (Law), 343. That in those States where notice is required to ter-

minate the carrier's liability, the reasonable time dates from the giving of the notice, but in the present case the form of notice used by the company attempts to limit the effect thereof, and plainly states that the company's liability as carrier is to terminate upon the arrival of the goods, and the defendant in error had knowledge of this by the receipt of other similar notices.

Judgment reversed, and case remanded with instructions to enter judgment in favor of plaintiff in error.

Opinion by *Brewer, J.*

INCORPORATION.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

The Bank of California, *applt.*, v.
David J. Grath and others, *respts.*

Decided May 1, 1876.

An act of the Legislature providing for the formation of corporations for manufacturing, mining, mechanical or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, does not permit the incorporation under it of a banking corporation.

In an action brought by one corporation against trustees of another corporation to recover by way of penalty for failing to file a certificate of the condition of such company, a debt incurred by the corporation of which the defendants were trustees, defendants may contest plaintiff's incorporation.

This action is brought by the plaintiff, alleging itself to be a banking corporation organized under and by virtue of the laws of California, against certain trustees of La Abra Silver Mining Company, a corporation organized under the general mining laws of the State of New York, seeking to

charge defendants with a debt (money loaned) allowed to be due by the New York Company to the California Bank, because they as such trustees did not cause to be filed the report of the condition of said mining company as required by 12th section of the act under which said mining company was organized. The answer put in issue the existence of the plaintiff as a corporation.

At the trial of the issues, the plaintiff, in order to prove its existence as a banking corporation, introduced a general statute of California, passed in 1853, which provided that "Corporations for manufacturing, mining, mechanical or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, may be formed according to the provisions of this act," then follows provisions for the formation of corporations under the act by filing certificate, &c.

The certificate under which plaintiff claimed to be incorporated, filed under the act aforesaid, May 12, 1864, was introduced, and stated the objects for which the company is formed are to engage in and carry out the business of banking to such extent, and in all such branches as may be legally done under the constitution and laws of the State of California, and it contains no other provision as to the objects of the organization of such corporation.

Plaintiff relying upon this evidence to establish its existence as a corporation, defendants moved to dismiss the complaint on the ground "that a banking corporation could not be created under said act of the Legislature of the State of California of 1853, and that said act and said certificate of incorporation did not create the plain-

tiff a corporation for carrying on the business of banking or at all." The motion was granted. Exceptions directed to be heard in the first instance at the General Term and judgment meantime suspended.

On the argument of the appeal it was urged by the appellant, that when the court directed a non-suit, the appellant was in the midst of its evidence, and *non-constat* but it would have given other and additional proof of its incorporation.

Thos. L. Snead, for applt.

Britton & Ely, for respts.

Held, That there was no error in the direction of the court dismissing the complaint.

That with reference to the point now made on the part of the plaintiff that when the court directed a non-suit, the plaintiff was in the midst of its evidence, *non-constat* but it would have given other and additional proof of its incorporation, that point should have been suggested to the court below. There is nothing in the case to indicate any such suggestion, and we must assume from what does appear that when the defendant raised the question of the validity of the incorporation it was substantially conceded that the plaintiff had exhausted its proof on that subject, and that the transaction for which the action was brought was in fact the loaning of money by the plaintiff as a bank in the exercise of banking powers.

That the attempt to create, under the act referred to, a banking corporation having the powers expressed in the certificate, was of no legal force, and that the plaintiff cannot maintain this action based upon a transaction which was, as the complaint substantially shows, an exercise of its usurped banking powers.

The defendants were not dealers with the plaintiff. They were not therefore shown to be estopped from denying the existence of the corporation. They were clearly at liberty to contest the validity of plaintiff's corporate existence.

Motion for new trial upon the exceptions denied, and judgment directed for the defendants with costs.

Opinion by *Davis, P. J.*; *Brady and Daniels, JJ.*, concurring.

APPEAL.

N. Y. SUPREME COURT. GENERAL TERM.
FIRST DEPARTMENT.

Minnie Hauck, applt., v. *Samuel Craighead et al.* as executors, &c., and *Lafayette Harrison, defts.*

Decided July 6, 1876.

No appeal being taken from an order in behalf of plaintiff amending the complaint upon the trial, the defendant being successful, it stands intact as a part of the case, with all the benefit to the plaintiff to be derived therefrom.

Evidence is admissible to show how a person came to sign a contract in an unusual place or what his relations were to the contract.

Where there is a conflict in the evidence upon a material issue in the case, the court must submit the question to the jury.

This action was commenced by the present plaintiff by her guardian, but subsequently she becoming of age, the action was continued in her own name. Samuel N. Pike, one of the original defendants, died since its commencement, and his executors have been substituted in his stead.

Its object is to enforce the liability of the original defendants, Harrison and Pike, on a contract purporting on

its face to be made between the plaintiff and the defendant Harrison only, but upon the margin of which Pike affixed his name. The following is a copy of the contract.

"Memorandum of an agreement made this day, February 18, 1868, between Lafayette Harrison and Miss Minnie Hauck, as follows:

"Miss M. H. engages herself as prima donna asoleta, for operas and concerts, for the term of two months from the 24th of February, 1868.

"Miss Minnie Hauck obliges herself to conform to all the rules and regulations of the theatre.

"Mr. Harrison obliges himself to pay Miss Minnie Hauck the sum of fourteen hundred dollars per month.

"L. F. HARRISON.

SAMUEL N. PIKE: "It is also understood and agreed that Miss Hauck shall sing at least three (3) times in each week, all extra performances to be paid at the rate of one hundred (\$100) per performance.

"It is also agreed that the salary shall be paid in each and every week."

The cause of action as set forth in the complaint against the executors of Pike, at the commencement of the trial, was in form on his guarantee for the performance of the agreement on the part of the defendant Harrison which the latter made with the plaintiff.

On the trial the court allowed an amendment of the complaint which changed the cause of action and charged the decedent, Pike, as an original joint contractor or promissor and rendered it necessary for the plaintiff to establish by competent proof that such was his relation to her.

After the amendment evidence was allowed on the trial under objection

and exception showing the occurrences and conversation which took place at the execution of the contract by Pike, to the effect that plaintiff would not make a contract alone with Mr. Harrison, and plaintiff's father told Mr. Pike that unless he would join in and become responsible for the contract, plaintiff would not make a contract, and Mr. Pike said the contract should be made and he would come to her wishes, and he signed his name to the contract.

At the trial, the complaint was dismissed upon the evidence as to the representations of Pike, upon the ground that the contract as made by Pike was made by him as guarantor, and that a principal and surety liable upon separate instruments cannot be joined in one action, on the authority of 10th Barb., 638.

G. V. N. Baldwin, for applt.

A. C. Fransiola, for resp't.

Held, That the defendant not having appealed from the order on the trial amending the complaint, it stands intact to be considered as part of the case with all the benefit to the plaintiff to be derived therefrom because the defendant succeeded.

The evidence given upon the trial as to the conversations and occurrences at the time of the execution of the contract by Pike was not to vary or contradict the agreement, but to show only why it was that he signed the paper where he did and in that way to show what he meant to assume—what, in other words, was his relation to the contract.

Held further, That it is quite clear that the decedent meant to be bound in relation to Harrison's contract, and if the plaintiff could regard him as an original contractor or guarantor, the

view of the learned justice at the trial was erroneous, and a new trial should be granted.

The plaintiff was entitled to have the issue passed upon created by the amendment allowed upon the trial, namely, whether or not the defendant's testator was a joint contractor with Harrison, and there must therefore be a new trial; costs to abide the event.

Opinion by *Brady, J. ; Davis, P.J. and Daniels, J.* concurring.

CIVIL DAMAGE ACT.

SUPREME COURT OF ILLINOIS.

William Roth, *applt.*, v. Mary Eppy, *reapt.*

Decided June 30, 1876.

Where it was alleged that the intoxication was caused in whole by the defendant, and the proof was that the intoxication was caused only in part by the defendant, held, that a recovery might be had.

What constitutes intoxication is a question of fact, to be determined by the jury upon the whole evidence, in the light of their own observation. As bearing upon the question of damages, it was proper to show any want of, and inability to obtain, employment, in consequence of Eppy's previous habits of intoxication.

That to support a finding of exemplary damages, there must be a finding of actual damage, and that without this, exemplary damages cannot be awarded.

This was an action on the case, brought on September 24th, 1874, by Mary Eppy, under the liquor act, against William Roth, to recover for injury in her means of support, in consequence of the habitual intoxication of her husband, George Eppy, from intoxicating liquors sold and given to him by Roth. The plaintiff in the court below recovered a verdict and

judgment for \$1,200, and the defendant appealed.

Appellee's husband had, for years, been drinking to excess at appellant's drinking saloon, and continued to drink there up to the time he became insane, June 21st, 1874. He was sent to the insane Asylum at Elgin in July, 1874, and remained there under treatment until sometime in April, 1875, when he was released and returned home.

The averment in the declaration is, that the defendant sold and gave to Eppy intoxicating liquors, "and thereby caused him, the said George Eppy, to become, and he was during that time before named, habitually intoxicated." It is claimed this is an averment that the intoxication was caused *in whole* by the defendant, and that such must be the proof; that it is not sufficient that the intoxication was caused *in part* by defendant; and that the most which the proof shows, is that defendant caused the intoxication *in part*.

Held, The statute gives the right of action where the defendant shall have caused the intoxication *in whole* or *in part*. (See N. Y. R. S. Part I, Chap. 20, Title 10, *Ed. W. Dig.*) Contracts are entire, and must be proved substantially as alleged, but torts are divisible, and in them the plaintiff may prove a part of his charge and recover, if there be enough proved to support the tort. *Hite v. Blanford*, 45 Ill. 9.

It was insisted that the evidence fails to show any habitual intoxication on the part of George Eppy.

It was conceded by appellant's counsel that the insanity of Eppy was caused by long continued excessive use of alcoholic liquors, that he had been in the habit of using intoxicating liquors to excess for many years, but it was denied

that it was to the extent of being habitually intoxicated.

There was a conflict of testimony as to the opinions of witnesses, whether at the various times testified to, the condition of Eppy, from the liquor he drank was one of intoxication or not. The testimony of some of the witnesses was, that they frequently saw Eppy at defendant's place intoxicated. Other witnesses stated his condition as verging on but not amounting to actual intoxication.

Held, The question was one of fact for the determination of the jury, upon the whole evidence in the light of their own observation. The decision of the question should rest with the finding of the jury, no sufficient reason appearing for disturbing it.

Eppy having recovered, he returned home from the insane asylum in April, 1875, and inquiries were made of witnesses as to his efforts to get employment, to obtain his former situation as locomotive engineer on the railroad, and his inability to do so. Exception was taken to such inquiries, which were permitted.

Held, That as bearing on the question of damages, it was proper to show any want of and inability to obtain employment in consequence of Eppy's previous habits of intoxication. The inquiry as to his desire for intoxicating liquors should have been excluded, but the refusal to exclude the inquiry was not of sufficient importance to amount to a fatal error.

The third instruction for the plaintiff was that under its hypothesis, the jury had a right, if they thought proper, to allow the plaintiff such punitive damages as they thought the evidence warranted.

Held, no error; that as the court

proceeded on the hypothesis that actual damage had been proved, it was not in conflict with *Frieze v. Tripp*, 70 Ill. 496.

Judgment affirmed.

Opinion by *Sheldon, J.*; *Breeze, J.*, dissents on the ground that the damages are excessive.

ACTIONS AGAINST RECEIVERS

SUPREME COURT OF IOWA.

Allen, applt. v. Central Railroad Company of Iowa, respt. (December, 1875.)

While a court of equity will, on a proper application, protect its own receiver, when his possession is sought to be disturbed, and while a plaintiff desiring to prosecute a claim against the receiver might, very properly, obtain leave to prosecute, yet his failure to do so is no defense to his action on the trial thereof, and especially so where there is no attempt to interfere with the possession of the receiver, but only to obtain a judgment on a claim for damages.

This was an action for damages in being ejected from a car by one of defendant's employees.

The petition showed that plaintiff, on the 18th of January, 1875, purchased of the ticket agent of defendant, at Albia, a ticket from Albia to Oskaloosa. The conductor, before the train arrived at Eddyville, took up plaintiff's ticket, and afterwards demanded of him the fare from Eddyville to Oskaloosa, and upon his refusal willfully and maliciously ejected him from the train.

The answer denies all the allegations of the petition, and alleges that on the 7th day of January, 1875, one D. W. Pickering was duly appointed receiver of the defendant, with full powers, by the Judge of the Circuit Court of the United States for the District of Iowa, and that it was ordered that he take charge of all the property, income, &c.,

of defendant, and that he pay no debts or expenses except to operate the road, without special orders; that he accepted and entered upon the discharge of his duties, and has operated the road since January 7th, 1875.

Plaintiff demurred, but the demurrer was overruled, and he thereupon filed a reply denying every allegation of the answer.

On the trial the judge instructed the jury as follows:

"The foregoing instructions are given upon the theory that plaintiff is entitled to maintain this action, but if you find that at, and before, the commission of the alleged injury, by a decretal order of the United States Circuit Court, the defendant corporation passed into the hands of a receiver, and that in said order, among other things, it was decreed 'That said receiver take full charge of all the property, income, profits, earnings and receipts of said Central Railroad Company of Iowa, and that the said receiver pay out of the income, receipts and earnings of the road, no debts or expenses of any kind, without special order * * except such as shall become due, belong to, and come within the category and character of operating expenses of the road,' and you further find that no leave has been asked and given to prosecute this case, as against defendant, to and by the United States Circuit Court, then you will find for defendant; but if such leave has been given, or no such order or decree has been entered and made, and no such proceedings had, then you will not consider this branch of the case."

There was a verdict and judgment for defendant, from which plaintiff appeals.

Held, That the instruction was er-

roneous; that the court did not, in this instance, nor in any other, direct the jury that defendant was not liable for wrongs done whilst the road was in the hands of a receiver; that the instruction impliedly recognizes this liability, but directs that the action cannot be prosecuted against defendant unless leave has been given to do so by the court appointing the receiver.

That while it is admitted that a court of equity will, on a proper application, protect its own receiver, when the possession which he holds under the authority of the court is sought to be disturbed, and while a plaintiff desiring to prosecute a legal claim for damages against a receiver might, in order to relieve himself from the liability to have his proceedings arrested by an exercise of this equitable jurisdiction, very properly obtain leave to prosecute, yet the failure to do so is no bar to the jurisdiction of the court of law, and no defence to an otherwise legal action on the trial, especially where there is no attempt to interfere with the actual possession of the property which the receiver holds under the order of the court, but only an attempt to obtain a judgment on a claim of damages. *Kinney v. Crocker*, rec'r, 18 Wis. 74; *Paige v. Smith*, 99 Mass. 395; *Hills v. Parker*, 111 Mass. 508; *Camp v. Barney*, 11 N. Y. 373.

Judgment reversed.

Opinion by *Day, J.*

RAILROAD COMPANIES. DAMAGES. CONTRACT.

N. Y. COURT OF APPEALS.

Blair, admrx., &c., respt. v. The Erie R. Co., applt.

Decided June 6, 1876.

A contract between a railroad company and an express company which pro-

vides that the railroad company should assume the usual risks upon express matter, except that it should not assume any risk or loss upon any money, &c., for which, with the express company's safes and messengers, no charge for carriage was to be made and the latter were to ride free, will not protect the railroad company from liability for negligence of its employees, by means of which one of the messengers is killed. Such protection can only be invoked where there is an express provision to that effect in the contract.

This action was brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by the defendant's negligence. Defendant claimed that it was not liable, upon the ground that the deceased, who was a messenger of the U. S. Express Co., was bound by the terms of a contract between said company and defendant. This contract originally provided that defendant should transport free of charge the money-safes, contents, and messengers of the express company, defendant "assuming no liability whatever in the matter." This was subsequently modified, and it was provided that defendant should assume the usual risks upon express matter, except that it should not assume any risk or loss upon any money, &c., for which, with the express company's safes and messengers, no charge for carriage was to be made, and the latter were to pass free of charge.

E. C. Sprague, for applt.

Geo. B. Bradley, for resp't.

Held (Earl, J., dissenting), That defendant could not, under the contract, claim to be protected from liability for negligence on the part of its employees; that such protection could only be invoked when the contract

contained an express provision to that effect. 15 N. Y. 444.

Smith v. N. Y. C. R.R. Co. 24 N. Y. 222;

Bissell v. " " 25 Id. 442;

Poucher v. " " 49 Id. 263;

Stinson v. " " 32 Id. 333;

and *Eaton v. D. L. & W. R.R. Co.* 57 Id. 382 distinguished.

It seems that a person employed temporarily in the place of the messenger would stand in the same position.

Judgment of General Term, affirming judgment for plaintiff on verdict, affirmed.

Opinions by *Miller and Allen, J.J.*

FIRE INSURANCE. WAIVER.

N. Y. SUPREME COURT. GEN'L TERM.

FOURTH DEPARTMENT.

Newton, resp't., v. Allemania Fire Insurance Company, applt.

Decided June, 1876.

An agent of an insurance company may waive by parol a condition in a policy, even where the policy requires any waiver to be endorsed on the policy.

This is an action on a policy of insurance. Plaintiff was owner of a mill on which plaintiff and several other companies had policies. The mill had been owned by H. & A. and they sold to plaintiff. Plaintiff, after the sale, took all of his policies to defendant's agent, who was also agent for other companies, to obtain consent to the transfer of such property. Defendant's agent took the policies and made endorsements on some and entries in his books and handed all back to plaintiff. Plaintiff supposed defendant's policy was endorsed with the rest, as it was handed to the agent with the others and examined by him, but after the fire it was discovered the policy was not so endorsed, and defendant's agent made no mem-

orandum of it. The policy contained the usual condition as to change of title, and that such consent must be endorsed on the policy. Defendant's agent acted under a written commission and had all the powers of an Insurance agent. There was a verdict for plaintiff.

Thayer & Benedict, for resp't.

F. G. Strong, for appl't.

Held, That an agent authorized by an insurance company to accept risks, to agree upon and settle terms of insurance and to carry them into effect by issuing and renewing policies, is a general agent, and as such he has power to waive a condition in the policy that any waiver of any condition in the policy must be in writing and endorsed on the policy, and such waiver may be by parol.

Judgment affirmed.

Opinion by *Mullin, P. J.*

SURETIES ON UNDERTAKING.

N. Y. SUPREME COURT. GENERAL TERM,
FIRST DEPARTMENT.

Samuel T. Knapp, et al., *respts.*,
v. Orrin B. Anderson, et al., *appls.*

Decided July 6, 1876.

The discharge of a bankrupt judgment debtor from a judgment from which an appeal is pending, and before its affirmance upon such appeal, does not discharge the sureties upon the undertaking on appeal given to stay proceedings upon the judgment pending the appeal.

Appeal from an order sustaining the plaintiffs, demurrer to the answer, with liberty to the defendants to answer. Action brought upon an undertaking on appeal given by defendants to stay proceedings upon appeal from a judg-

ment in favor of plaintiffs against one Henry S. Leszynsky.

The answer sets up for defence that after the rendition of the judgment against Leszynsky, and before its affirmance by the General Term upon the appeal taken therefrom, Leszynsky, the judgment debtor, was duly discharged from all his debts under the provisions of the U. S. Bankrupt Act of 1867, and that the judgment was founded upon a debt of a character not excepted from the operation of said act. The plaintiffs demur upon the ground that the answers do not disclose a sufficient defense.

The only question presented upon the appeal was whether the discharge of Leszynsky, the principal debtor, before the affirmance of the judgment, releases the sureties upon the undertaking on appeal.

John A. Mapes, for respts.

Morris Goodheart, for appl'ts.

Held, That whether the sureties are discharged or not depends upon the effect of section 33 of the Bankrupt Act, which provides as follows: "No discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, contractor, endorser, surety or otherwise."

That the view taken by the appellants and defendants that they were not liable until the affirmance of the judgment is erroneous. That the discharge of the principal under the U. S. Bankrupt Act does not release the sureties upon the undertaking, and that the order appealed from must be affirmed.

Opinion by *Brady, J.*; *Daniels J.*, concurring.

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ACCIDENTAL INSURANCE.

Where a policy of accidental insurance contains a provision that "no claim shall be made * * where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks," and the insured, while in that state, was shot, *Held*, that the limitation related to his condition, not to the cause which might produce his death, *Shader, admr., v. Railway Pass. Ass. Co.* 578

It is not essential to work a forfeiture that the injury or death should occur in consequence of the use of intoxicating liquors. *Ib.*

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See NEGOTIABLE PAPER.

ACCOUNT STATED.

It is not sufficient proof of the correctness of an account when presented, that no objection is made; enough must be shown to justify such an inference. *Quincey v. White.* 37

In an action against several defendants for a balance upon an alleged account stated, it must be proved that there was a joint undertaking on the part of all the defendants to pay the amount of such balance. *Vandertip v. Keiser et al.* 62

Where an account stated is plead in defense to an action, and plaintiff avers that it was made at defendant's request to influence the action of another, but without effect, and that the accounts were in fact still open, it should go to the jury as to whether the account was in fact still open. *Baker, admr., v. Hoff, trustee, &c.* 388

ACTIONS.

An action for conversion will lie against one who has unlawfully parted with the possession of another's property. In such case he is regarded, to all intents and purposes, as still in possession, sufficiently so to render him liable in replevin or trover. *Corsan v. Oliver,* 183

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ken them from the plaintiff, although the latter held them under a claim of ownership. *Voltz v. Blackmar.* 323

A wife may maintain an action for loss of support resulting from the death of her husband against a person who sold him liquor, &c. *Smith v. Reynolds.* 576

Where it was alleged that the intoxication was caused in whole by the defendant, and the proof was that the intoxication was caused only in part by the defendant, *Held*, that a recovery might be had. *Roth v. Eppy.* 596

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As to actions by and against receivers, see RECEIVER.

See also, EQUITABLE ACTIONS.

ADVANCEMENTS.

One who advances money on growing crops, and afterwards receives them, under an agreement that he shall consign them for sale, is entitled to the proceeds as against the consignees, notwithstanding the consignees claimed under an older title from the original vendor, of which he had no notice. *Brown v. Combes et al.* 56

The consignees having received the crops from the consignor, under a notice that they were to be sold for his account, are estopped from setting up that they were to be made upon any other account. *Ib.*

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As to admissibility of affidavit of a party on motion to set aside a decree of divorce, see PRACTICE.

AGENCY.

Where commercial paper is sent to a bank for

collection, the bank becomes, not an agent for the sender, but an independent contractor, and may employ another bank to make the collection; but the latter is accountable only to the first bank, not to the owner of the paper. *Hyde v. The First National Bank of Lacon.* 342

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As to amendment of pleadings, see PLEADINGS.

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An order denying a motion to refer for want of power is appealable. *Harnden v. Corbett.* 21

The refusal of a judge to allow a witness to be sworn after the case has been closed, is not reviewable on appeal. *Saloman v. Van Praag* 28

An order denying a motion to amend a pleading is appealable. *Rocky Mountain National Bank v. Bliss.* 30

A refusal to grant an injunction is appealable. *Campbell et al. v. Seaman.* 41

A judgment claimed to be broader and more unlimited than the report of a referee authorizes, can only be corrected on motion to correct or set aside the judgment, it can not be corrected on appeal. *Ib.*

An appeal heard at General Term by three Judges can, after the death of one, be decided by the other two. *Ib.*

Judge's charge must be excepted to in order to bring same up for review. *Stewart v. Patrick.* 56

A party seeking, under the act of 1874, to restrict the general right of appeal, has the onus, and must bring the case within the act. *The People v. Horton et al.* 74

An order of the Special Term vacating an order confirming the report of commissioners appointed to appraise land sought to be taken for public purposes is discretionary. It may be reviewed at General Term, but is not appealable to the Court of Appeals. *In re application of N. Y. C. and H. R. R. R. for appointment of Commissioners to appraise lands v. Cunningham, et al.* 88

An order granting or refusing an attachment for contempt is not appealable to the Court of Appeals. *Sutton v. Davis, exr.* 99

The Court of Appeals will not disturb allowance made by the court below, when the latter does not exceed its jurisdiction. *Comins et al. v. Board of Supervisors of Jefferson Co.* 104

In an action at law embracing a number of items or claims, an appellate court has no power to affirm a judgment allowing one item or claim and send it back for a new trial as to another. *Wolsterholme et al. v. The Wolsterholme File Mfg. Co.* 128

Under Chap. 322 of Laws, 1874, limiting appeals, whether or not the subject matter in controversy exceeds \$500, must be determined by the complaint and testimony, and not by the judgment alone. *Lyon v. Wilcox et al.* 151

The facts found by a referee may be reviewed by the Appellate Court. *Crawford v. Keerson et al.* 168

The Court of Appeals will not examine the testimony with a view of ascertaining the merits, where the case was disposed of below upon an erroneous idea of the law. *Graves v. Waterman, admr. et al.* 186

Order directing payment of an extra allowance, since it affects a substantial right, is appealable. *Duncan v. Dewitt.* 199

The libellant claiming \$25,000, recovered a decree in the District Court for \$500, and the claimant having appealed to the Circuit, where the decree was reversed, no appeal lies to the Supreme Court of the United States. *Barney v. The Stm't D. R. Martin et al.* 232

Where evidence was received, "subject to objection," and the objecting party having taken no exception then, or subsequently, it cannot be considered on appeal. *Clark v. Donaldson.* 258

Order affecting a substantial right, though discretionary, is appealable. *Goodman et al. v. Guthman et al.* 338

An appeal must be taken from the denial of a motion for a new trial on the minutes in order to be taken advantage of on an appeal. *Phillips v. Pace.* 350

An order reviving a special proceeding pending against a discharged trustee at the time of his death, against his executors, is not a final order affecting a substantial right, and is not appealable to the Court of Appeals. *Petition of Whittleary.* 488

Courts of error have nothing to do with the verdict of a jury, except to ascertain if improper evidence was admitted to the jury, or whether they were misdirected by the judge. *First Unitarian Society v. Foulkner et al.* 493

An order denying application for a resale of mortgaged premises affects a "substantial right" as same as has been construed, and is appealable to the General Term, although involving the exercise of discretion. *Phillips et al. v. Cudlipp, impl'd.* 547

An order which, though involving a substantial right, is discretionary, is not appealable. *Platt et al., exrs. v. Platt.* 583

As to practice on appeal, see PRACTICE; VENUE.

APPOINTMENT.

Appointment of a collector of a school district by parol not good. *Burditt v. Barry.* 113

In a list of appointments sent by a Mayor to the Common Council for confirmation were the names of two members of said common council, *Held*, That that fact alone does not show that the Mayor thereby bribed said members to vote in favor of confirming the rest of the appointments. *The People ex. rel. Kilbourn v. Allen.* 425

The appointees were confirmed by a single vote, and in gross. *Held*, the confirmation was valid. *Ib.*

At the next meeting of the common council the Mayor sent in new appointments, in the place of the two members of the common council, who had in the meanwhile refused the nominations, and the board thereupon confirmed said new appointments, together with those acted upon at the previous meeting, with the exception of those refusing, by a single vote and in gross. *Held*, That the common council had not exhausted its power by the action taken at the previous meeting. *Ib.*

ARBITRATION.

Although one member of a firm cannot bind his co-partners by submission to arbitration without direct authority, any expression of intent to give such authority by the non-signing partner is sufficient to bind him. *Pierce et. al. v. Morrisson.* 2

The intendments are in favor of the validity of an award. *Ib.*

Where a submission to arbitration provided that each party should choose one referee, and in case they did not agree the two referees to choose a third one, the third referee is a joint arbitrator and not an umpire. *Gaffy v. The Hartford Bridge Co.* 180

It is the duty of an umpire to give notice to the parties and hear their evidence unless there is an express provision to the contrary in the submission, or the parties have so agreed. *Ib.*

ARREST AND BAIL.

Where the money may be received and credited in an account afterwards paid as a matter of general indebtedness, no right of arrest exists under sub. 2, § 179 of the Code. *Morange v. Waldron.* 37

To render the person liable to arrest under the above section of the Code, the identical money received must be the property of the creditor. *Ib.*

The Court will look into the facts and determine whether an order of arrest should be vacated the same in a case where the ground of arrest and the cause of action are identical as where they are not. *Liddell v. Paton et al.* 265

In order to sustain order of arrest in an action for money obtained in a fiduciary capacity, it must appear that there was an obligation on the part of the person retaining the money to hand over the identical money received. *Ib.*

Where there is an account between the parties, and interest is allowed on balances, an arrest cannot be sustained in an action to recover the balance of account. *Ib.*

When circumstances are so decided as satisfactorily to establish the conclusion that an intent to defraud existed when a purchase of goods was made, they will be sufficient to sustain an order of arrest, although no oral representations were made at the time of the purchase which were false. *Stewart et. al. v. Strasburger.* 435

When bail is indemnified, an application to the favor of the court for leave to surrender principal should not be granted. *Mills v. Rolewald.* 579

To sustain an order of arrest the affidavit upon which it is founded must set forth the facts upon which the conclusions are based. *Meriden Malleable Iron Co. v. Bau man.* 591

ASSESSMENTS.

Where money has been paid under a mistake of fact, although the party paying it was guilty of negligence, he may recover it, unless the position of the party receiving it has been changed in consequence thereof. *Mayer v. The Mayor, &c., of New York.* 25

Local improvements instituted by the corporation are public improvements, and the moneys collected therefor are held by the city in its own right, and not as depository. *Ib.*

Where a first contractor fails to complete the work, and it is subsequently completed at an increased expense, the city cannot be restrained from collecting the assessment until it has sued on the contractor's bond, for such increased expense. *Eno v. The Mayor, &c., of New York.* 362

Where a single improvement was properly ordered by the city authorities, and was let under separate contracts, and distinct assessments made to meet the expense under each contract, which assessments were afterwards annulled, and a single assessment made to meet the expense of the whole improvement, the latter assessment is valid; that the improvement was done under separate contracts affects no substantial right. *The People ex rel. Thompson v. The Mayor &c. of Syracuse.* 376

Where a deed contains a covenant that the premises conveyed are free from all taxes, assessments, &c., the grantor is bound to pay an assessment which has been levied but not yet entered so as to become a lien upon the property under the statute. *Dapcysier v. Murphy.* 429

Where commissioners have made expenditures upon lands to which they have not acquired title, the assessments made for the bene-

fits conferred cannot be supported (*People v. Haines*, 49 N. Y., 587, followed). *Water Commissioners of Poughkeepsie v. Owners of Lands*. 430

Proceedings to vacate should be taken under the statute. *People ex. rel., Vanderpoel v. The Mayor, &c. of New York*. 575

As to when assessment becomes a charge on the land, see DEEDS.

ASSESSORS.

An action will not lie against an assessor for a wrongful entry on the rolls of the value of property. *Youmans v. Simmons*. 431

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY.

ASSIGNMENTS.

An assignment of a judgment of a court of the State of Pennsylvania between parties resident, for value, is not merely a statutory transfer of it, but a sale, valid everywhere; and after such assignment, the assignor has no attachable interest in it. *Noble et al. v. The Thompson Oil Co.* 121

An assignee of a judgment takes it subject only to such equities as exist in favor of the defendant at the time of the assignment. *Swift v. Prouty*. 406

If the defendant has any equities against the assignee they can only be asserted by an action. *Ib.*

As to right of action in an assignee against a trustee, see TRUSTEES.

As to consideration for, see EVIDENCE.

As to power of assignee in bankruptcy, see BANKRUPTCY.

ATTACHMENT.

A sworn copy of complaint setting out the plaintiffs' cause of action in full, annexed to the affidavit, on which an attachment is issued, and referred to therein, is a substantial compliance with sec. 229 of the Code. *Crandall et al. v. McKee*. 75

A place of business in N. Y. City does not constitute one a resident of this State, except for the purpose of an action in the N. Y. City District Courts. *Wallace et al. v. Castle et al.* 227

The sureties on an undertaking given to discharge an attachment issued from the Marine Court of the City of New York, may justify before a county judge of the county in which they reside. *Seed v. Teall*. 545

As to restriction against issuing attachment against national banks, see NATIONAL BANKS.

ATTORNEY AND CLIENT.

The power of the officers of a corporation to employ counsel is implied, and need not be proved. Such officers have power to engage attorneys without receiving any express delegation thereof. *Southgate v. Atlantic & Pacific R. R. Co.* 111

To prove the value of certain services, the evidence should show what those particular services are reasonably worth, not what is the value of services generally. *Ib.*

As to privileged communications, see *Lewin, assignee v. Redfield*. 198

The court will extend its aid to an attorney, to prevent his being defrauded by any collusive action between the parties to a suit out of his compensation, but he is called upon to seek the aid of the court with diligence; and an unreasonable delay and laches on his part will be as fatal to his claim as it would be to the claim of any other suitor. *Richardson v. The B. & N. R. R. Co.* 324

Proceedings by an attorney to enforce his claim do not constitute an action within the literal operation of the statute of limitations, but in enforcing it the court will be governed by the analogy of the Statute. *Ib.*

An agreement between an attorney and his client, entered into after the services have been rendered, and are supposed to have been successful, that the attorney shall receive a per centage of the amount recovered, is not an illegal contract. *Wright v. Tibbit s.* 467

A settlement made after suit is commenced, and without notice to an attorney, is not good, and the attorney may either prosecute the action or sue the parties making such fraudulent settlement. *Coughlan v. The N. Y. C. & H. R. R. Co.* 564

As to payment to counsel in bankruptcy cases, see BANKRUPTCY.

As to right of attorney for party to testify in his behalf, see EVIDENCE.

As to improper conduct of, see PRACTICE.

See also, PRINCIPAL AND AGENT.

AWARD.

No award can properly be made for other than nominal damages for the taking of land for public use, which has already been dedicated by a former owner to such public use. *Matter of application of the Department of Public Parks*. 219

Where commissioners, in ignorance of the fact of a former dedication, award damages to unknown owners, the court especially, where all the parties are before it, may correct the error. *Ib.*

See ARBITRATION.

BAIL.

As to exoneration of bail, see **ARREST.**

BAILMENT.

See **COMMON CARRIERS ; WAREHOUSEMEN.**

BANK CHECKS.

A bank having certified a raised check as good, is bound to pay it to an innocent holder. *Louisiana National Bank v. Citizens's National Bank.* 230

The holder of a bank check is bound to present it within a reasonable time, but what is a reasonable time depends upon the particular circumstances of each case, the time, the mode, and the place of receiving the check, and the relations of the parties. *Woodruff v. Plant.* 257

The time for presentment may be extended by the assent, express or implied, of the drawer. *Ib*

The holder of a bank check must present and collect it the same day, or he is chargeable with laches. *Farewell et al. v. Curtis* 499
He cannot extend the time for which the drawer is liable. *Ib*

BANKRUPTCY.

No individual exemption can be allowed out of a partnership estate at the expense of the joint creditors. *In re Stewart and Norton.* 3

Payment to counsel for services in preparing bankrupt's petition and schedules is not preferential. *In re Thompson.* 4

Bankrupt is entitled to an allowance in money from his estate for the support of himself and family, not exceeding, with his furniture and other articles, five hundred dollars. *Ib*

He is not entitled to receive the probable expenses of procuring his discharge. *Ib*

An action by an assignee is barred by the two years' limitation, although the assignee may not have discovered the right of action until after its expiration. *Norton, assignee, v. De La Villebeuvre.* 4

The limitation applies as well to those causes of action which existed prior to the adjudication in bankruptcy as to those which arise subsequently. *Ib*

The U. S. District Court, upon adjudicating a corporation bankrupt, and appointing an assignee, may make an order requiring stockholders to pay to the assignee an unpaid balance upon the stock severally held by them; and such order may be made without notice to the stockholders, and cannot be attacked collaterally. *Sanger v. Upton, assignee, &c.* 6

The assignee, upon non-compliance with such order, may sue any stockholder, in an action at law, to enforce his liability, or he may maintain a bill in equity against all the delinquent stockholders jointly. *Ib*

The capital stock of an incorporated company is a fund set apart for the payment of its debts, upon which creditors have a lien in equity. As regards creditors, unpaid stock is as much a part of the assets as any other property of the company, and they have the same rights to insist upon its payment as upon the payment of any other debt due the company. *Ib*

Although there was no evidence that defendant subscribed for the stock or made any express contract with the company in regard to it, having bought, paid for it (20 per cent.), and received a dividend on it, she was liable. *Ib*

An assignee in bankruptcy, acquiring title to lands by virtue of the Bankrupt Act, pending a litigation in a state court concerning them takes subject to the final decree of that court. *Eyster v. Gaff.* 75

A general assignment for the benefit of creditors without preferences is not fraudulent or void, and where executed six months prior to the filing of a petition in bankruptcy, against the assignor, is not assailable by the assignee in bankruptcy, nor can he recover possession of the trust property. *Mayer et al. v. Hellman.* 101

Defendants preclude themselves from objecting that 20 days' notice was not given as required by §§ 982 and 5056 of the U. S. R. S., by retaining property instead of tendering amends, and by going to trial on the merits. *Crawford v. Eveson et al.* 168

The assignee of a corporation, by virtue of bankruptcy, has complete dominion over the assets transferred to him, and could sue for the recovery of an unpaid assignment upon stock. *Michener v. Payson, assignee.* 193

An exemplification of a portion of the bankruptcy record is admissible to prove the assignment in bankruptcy and the assessment by the authority of the court. *Ib*

It is incompetent for the defendant to testify that he had purchased the stock upon representations of the company's agent, which had not been carried out. *Ib*

Whether there be any evidence at all of a fraudulent preference under the Bankrupt Act is a question for the court; the sufficiency of the evidence is a question for the jury. *Lewin, assignee, v. Redfield.* 198

After a resolution of composition in bankruptcy has been duly adopted and confirmed, the debtor may have an attachment quashed that was issued against his property before the commencement of the proceedings in bankruptcy, for the debt is thereby extinguished. *Miller v. Mackenzie.* 205

When a composition in bankruptcy has been effected by giving the notes of a third party, and the notes are not met at maturity, the creditor is remitted to his right to sue upon the original debt. *Edwards et al v. Hancher.* 233

An assignee in bankruptcy, in order to recover property held under state authority, must do so

by a plenary suit; it cannot be done by summary application to a bankrupt court. *O'Brien v. Weld et al.* 305

But where a plaintiff in execution, under which property had been taken, makes application to the bankrupt court, by petition, to allow the sheriff to proceed to sale, &c., and obtains the order asked, under which the proceeds are paid into the bankrupt court, he is bound by it. *Ib.*

After the close of a bankruptcy, property falling in to the bankrupt belongs to him, and not to the trustee in bankruptcy, although the bankrupt has not obtained an order of discharge. *In re Pettit's estate.* 336

An action to recover the excess of interest unlawfully exacted from the bankrupt, may be maintained by his assignee in bankruptcy, but he must pay or offer to pay the loan as a condition precedent; he is not a borrower within the meaning of our statute. *Wheelock, assignee, v. Lee.* 374.

Although under the ordinary statutes of limitations, the rule is that where the cause of action is based upon fraud, the statute does not commence to run until it has become known to the party injured by the fraud, still, as by section 34 of the Bankrupt Act, it is positively provided that the discharge may be contested within two years after the date thereof, this must be taken as the limit, and the plea of the statute of limitation is a good plea in an action to set aside a discharge as fraudulently obtained. *Pick. & v. McGarick.* 378

U. S. Circuit Courts may exercise the jurisdiction conferred upon them by the Bankrupt Act whenever it obtains jurisdiction of the parties, irrespective of the district in which the decree in bankruptcy was made. *Burbank, &atrix, v. Bigelow et al.* 398

A secured creditor is in no way bound by a compounding debtor's estimate of the value of his security. *Ex parte Hodgekinson.* 409

He is entitled to abstain from proving his debt, or taking any part in the composition proceedings, and, when he has realized his security, he may claim from the debtor payment of the composition upon the balance which may then remain unsatisfied of the debt. *Ib.*

An assignee in bankruptcy is entitled to property which has been purchased in the name of the bankrupt's wife, where it is shown that the wife contributed but little towards the purchase, and the husband has increased its value by his own time and labor. *Muirhead, assignee, v. Alldridge.* 480

A debtor cannot deprive his creditors of the product of his labor, by putting it in the form of property only nominally acquired by his wife. *Ib.*

The filing of a petition in involuntary bankruptcy will not divest a state court of jurisdiction over an action pending in such court for the foreclosure of a mortgage on property belonging to the bankrupt. *In the matter of Irving.* 500

As to constitutionality of Amending Bankrupt Act of 1873, see CONSTITUTIONAL LAW.

BAR.

A judgment in favor of other parties, setting aside assessments, cannot be used by another person on ground that such judgment operated to annul the whole assessment. It only affected the parties to that judgment. *Zink v City of Buffalo.* 74

When a former judgment is set up in bar of a pending action, it is not required to be pleaded with any greater strictness than any other plea in bar. *Gould ex rel. v. Evansville and Crawfordsville R. R. Co.* 164

In the plea of a former judgment, the parties and the cause of action being the same, the *prima facie* presumption is that the questions presented for determination are the same, unless it appears that the merits of the controversy were not involved in the issue. *Ib.*

A judgment rendered upon a demurrer to the declaration or other pleading in chief, is equally conclusive of the matter confessed by the demurrer as a verdict finding the same facts would be. If, however, the plaintiff fails on demurrer in his first action, for the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second. *Ib.*

As to time when action by assignee in bankruptcy is barred. See BANKRUPTCY.

See also ESTOPPEL; EVIDENCE; STATUTE OF LIMITATIONS.

BIGAMY.

Bigamy consists in the unlawful contracting of a second marriage. Cohabitation forms no element of the offense, and does not perpetuate it day by day. *Giss v. The Commonwealth* 224

The statute of limitations runs from the time of the illegal contract of marriage. *Ib.*

BILLS AND NOTES.

See NEGOTIABLE PAPER.

BILLS OF EXCHANGE.

Where a bill is accepted and handed over for value, but at the time of acceptance there is no drawer's name on it, any *bona fide* holder for value is entitled to insert his own name as drawer and to sue the acceptor for the amount of the bill. *Harvey v. Crane.* 303

The drawees of a bill of exchange are only held to a knowledge of the signature of the drawer; and in accepting and paying a bill which has been fraudulently raised after delivery to the payee, they merely vouch for the genuineness of the signature of the drawer, and may recover back from the holder whatever they may have paid over the amount of the bill as originally drawn. *White et al. v. Continental National Bank.* 337

The holder of such a raised bill is held to a knowledge of his own title, and of the endorsements of the bill prior to his.

Ib.

BILL OF LADING.

A broker who comes into possession of goods without the knowledge or consent of his principal, ships the goods and takes a bill of lading, may by endorsement transfer the title to a *bona fide* pledgee, under the laws of Louisiana. *Henry v. The Phila Warehouse Co.* 217

A shipper or his assignee is bound by the value of the goods written in the bill of lading. *Et ins v. The Empire Transportation Co.* 235

Where the written and printed parts of a contract are at variance the written must govern. *Ib.*

BILL OF PARTICULARS.

A bill of particulars should contain specific statements of service, date of rendition and sum charged, if not for each item, certainly for those occurring on the same day. *Corbett v. Trowbridge et al.* 255

BLACKMAIL.

It is not necessary to threaten, in express words, to accuse another of a crime, in order to come within the intent of the law against blackmail; it is enough if the threat is insinuated. *The People ex rel. Crimmins v. Morgan et al., Justices.* 140

BONA FIDE HOLDER.

Where detached coupons and interest warrants have been stolen, a *bona fide* transferee for value acquires a valid title to the coupons, but not to the interest warrants. *Evertsen v. National Bank of Newport.* 574

As to rights of see NEGOTIABLE PAPER; TOWN BONDS; RAILROAD BONDS.

BOUNDARIES.

A line between adjoining owners located and recognized as such for 20 years becomes a fixed boundary. *Stewart v. Patrick.* 56

As to estoppel from denying boundary line, see ESTOPPEL.

As to evidence of location of boundary, see EVIDENCE.

As to change of boundary, see DEEDS.

BREACH OF CONTRACT.

See CONTRACT.

BROKERS.

A party employing broker to sell or exchange property, is entitled to his disinterested efforts and judgment. *Hoyt et al. v. Howe.* 177

If brokers, while so employed, bring to him a

purchaser, by whom they are also employed, without disclosing such fact to former employer, it would be such a fraud as would prevent his recovering any compensation. *Ib.*

A broker having signed and sent to the plaintiffs a note of a contract in the following terms: "I have this day sold by your order and for your account to my principals about five tons of pressed anthracene. W. A. Bowditch," is personally liable in an action for goods sold and delivered upon the contract. *Southw. et al v. Bowditch.* 248

To enable a broker to recover commissions for procuring a contract, he must show that he was the procuring cause of the identical contract which was subsequently entered into by the parties. *Allis v. The Phillip-bury Mfg. Co.* 411

As to evidence in an action to recover brokerage on a sale of real estate, see EVIDENCE.

BURDEN OF PROOF.

See EVIDENCE.

BURGLARY.

The breaking to constitute burglary need not be violent or with great force; to raise a window or push open a closed door is sufficient. *The People v. Ticknor.* 136

In order to convict of burglary a breaking and entering with a felonious intent must be shown. *McCourt v. The People.* 422

CERTIORARI.

The right to the writ of certiorari to remedy a private wrong is lost, unless application is made for the writ within a reasonable time after the commission of the wrong complained of; and any laches must be satisfactorily explained. *People ex rel. Lyon v. Com'rs of Police.* 503

The writ will not be granted after a lapse of more than three years from the commission of the act complained of. *Ib.*

The records of proceedings in an assessment cannot be reached by certiorari to the Mayor, &c., by one seeking to vacate the same. *The People ex rel. Vanderpool v. The Mayor, &c., of N. Y.* 575

CHARTER PARTY.

See EVIDENCE.

CHATTEL MORTGAGE.

A mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business is not void per se. Whether there is a fraud in the particular case, is a question of fact. *Brett v. Carter.* 331

A mortgage of after-acquired chattels is valid. *Ib.*

COMMISSION TO EXAMINE.

Irregularities in the return to a commission should be taken advantage of by a motion before trial. *Rube et al. v. Winne.* 371

Consent to the issue of a second commission is not a suppression of the first. *Ib.*

Both may be read in evidence, in the discretion of the court. *Ib.*

COMMISSIONERS OF HIGHWAYS,

See HIGHWAYS.

COMMON CARRIER.

A common carrier is not liable for the non-delivery of goods taken from his possession by legal process, without any act, fault, or connivance on his part. *The O. & M. R. R. Co. v. Yoke et al.* 26

Nor is he bound to follow them up on behalf of the party for whom he undertook to carry them. But he must give prompt notice that the goods have been seized and taken from his possession. *Ib.*

A common carrier is bound to transport goods within a reasonable time, and if he negligently omits to do so, is liable for the damages occasioned thereby. *Sherman et al. v. The H. R. R. Co.* 176

The damages, in such case, are measured by the difference between the value of the goods when they ought to have been delivered, and their value at the time of their actual delivery. *Ib.*

The carrier is bound to give notice, or do what the law esteems equivalent to a delivery of the goods to the consignee, before he can warehouse them. *Ib.*

Plaintiff having collected certain back pay money from the government as the agent of persons claiming to have been soldiers, cannot support an action against a carrier to whom he has delivered it pursuant to his principal's orders; nor will it aid him to show that the consignees' names were not on the government muster rolls; nor that a great length of time has elapsed since delivery to carrier and the consignees have not appeared, nor that consignees were not entitled to receive the money from the government. *Thompson v. Fargo, treat'r, &c.* 343

A forwarder who does an act in good faith, which results in a loss of the goods forwarded, is not liable to the consignee by whom he was employed. *Stannard et al. v. Prince.* 397

A carrier's liability continues until the consignee has had a reasonable time to call for, examine and remove the goods. *Leavenworth, Lawrence & Galveston R. R. v. Maris.* 592

A reasonable time is such as would enable

one living in the vicinity, in the ordinary course of business, and in the usual hours of business, to inspect and remove them. *Ib.*

Where it is agreed that notice of arrival shall be given the consignee, the reasonable time runs from the date of receipt of such notice, unless it contains a stipulation that the liability of the carrier shall cease on the arrival of the goods. *Ib.*

As to liability of railroads as common carriers, see RAILROADS.

CONDITIONAL SALES.

When the parties to a sale of real estate stipulate at the time of sale, that on a resale, the grantor is to have a portion of the profits, such stipulation is legal, but the grantor has no right to insist on a sale after the stipulated time. Such a transaction is not a mortgage. *Macaulay v. Porter.* 113

In cases of conditional sales where the title is to vest in the purchaser upon payment of the price, the purchaser may perfect his title to the property at any time by tender of the price, although it is payable by installments and they are not due. If the debt was payable with interest, the purchaser must pay interest until the maturity of the debt. *Cushman v. Jewell.* 567

CONSIDERATION.

Where parties own a patent, believing it to be valid, and one, under an agreement, gives up to the other all rights under it, and the other enjoys all rights that he could have had if the patent had been valid, there is sufficient consideration to uphold the agreement. *Marst'n v. Switt et al.* 450

As to whether, under such circumstances, there is a failure of consideration which will defeat an action for the purchase price, *quære.* *Ib.*

The trouble and expense to which a party is subjected in following the directions of a contractor in respect to the time and place of filing his claim against a sub-contractor, is a sufficient consideration to support a promise on the part of the contractor to pay the debt of the sub-contractor. *Barton v. Harrington et al.* 533

As to consideration for conveyances, see DEEDS.

As to consideration for assignments, see EVIDENCE.

CONSTITUTIONAL LAW.

The legislature has no power to authorize a municipal corporation to take stock in a private corporation, and to issue its bonds in payment thereof. *Weisner v. The Village of Douglas.* 50

The legislature cannot impose, or delegate, to

a municipal corporation, power to impose a tax for a private purpose *Ib.*

Chapter 49 of the laws of 1875 is not unconstitutional. *The People v. Tweed et. al.* 181

A license tax required for the sale of goods is in effect a tax upon the goods themselves. *Welton v. State of Missouri.* 189

A statute of a State which requires the payment of a license tax from persons who deal in the sale of goods, wares, and merchandize which are not the growth, produce, or manufacture of the State, by going from place to place to sell the same in the State, and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the State, is unconstitutional and void. *Ib.*

It was not the intent with which the Constitutional Provision (Sec. 16, Art. 3) was framed, that the Title of an Act of the Legislature should contain all the details set forth in the act. *Freeman v. The Panama R. R. Co.* 148

The design of the Constitutional provision was to prevent the uniting of various objects having no necessary, or natural connection with each other in one bill. *Ib.*

Geographical situs and various other circumstances may be considered in determining the proper construction to be given to a statute. *Ib.*

A statute of a State which operates directly upon an immigrant by requiring the master, owner or consignee of a vessel bringing foreigners into such State, to give an onerous bond for the future protection of the State against the support of the passenger, is in conflict with the Constitution of the United States, and therefore null and void. *Oh Y Lung v Freeman et. al.* 237

The State cannot be compelled to proceed with the erection of a public building by a contractor with whom it has a contract for its erection. A law of the State suspending such a work is not unconstitutional, as impairing the obligations of the contract. The contractor's remedy for any damages he might sustain is an application to the legislature. *Lord et. al. v. Thomas.* 247

The obligation of a contract can no more be impaired by a constitution than by ordinary legislation, *Town of Moultrie v. The Rockingham Ten Cents Savings Bank.* 271

Although a contract is illegal by reason of creating an indebtedness beyond what was authorized by law, it is competent for the legislature to legalize it. *Nelson v. The Mayor, &c., of N. Y.* 313

It seems that in case such a contract is illegal, that the contractor is not without his remedy, where the city has received and used the property. In such a case there is, independent of the contract, an implied obligation to pay its value. *Ib.*

In construing the constitution, effect must be

given to the intention of the framers, and the construction should be a liberal one where the object is the prevention of abuses and a preservation of the public good. *In the matter of the application of the Water Commissioners to acquire title, &c.* 416

The provision of the constitution which declares that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act; or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting in it such act," applies to acts referring to existing local or private laws, or to laws appropriating money to pay claims against the State, and is not intended to require that all general laws must be incorporated in all subsequent ones that may have reference thereto. *Ib.*

A bankrupt law which adopts the exemption from execution prescribed by the laws of the several States, is uniform and therefore constitutional, as far as such exemptions are concerned. *In re. Smith.* 583

In passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law, and courts will not pronounce it unconstitutional unless its incompatibility is clear, decided and inevitable. *Ib.*

It is competent for the legislature, as between the people and one elected to office, to construe its own act, and to waive any irregularity in holding the election, and thus confirm the title. *People v. Flanagan.* 565

See TOWN BONDS.

CONSTRUCTION OF STATUTES.

In a statute directing the Board of Supervisors to audit an account not a legal charge on the county, the word "may" is not to be construed "shall." *The People ex rel. Conway v. Board of Supervisors of Livingston Co.* 280

It might be so construed in an act to enforce a right already existing. *Ib.*

A statute only operates as a repeal by implication of a former one upon the same or a cognate subject to the extent that the two are repugnant; they will both stand to the extent they can be given effect. *Harkens v. The Mayor, &c., of N. Y.* 845

The title of Chap. 342, Laws of 1840, shows that the intent of the legislature, in enacting the statute of 1840, was merely to accomplish a reduction of the expenses of foreclosing mortgages, and its operation should be restricted accordingly. *Curtiss, exr. v. McNair.* 309

An act of the legislature providing for the formation of corporations for manufacturing, mining, mechanical or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, does not permit the incorporation under it of a banking corporation. *Bank of California, v. Garth et al.* 593

See CONSTITUTIONAL LAW.

CONTAGIOUS DISEASES.

See TRESPASS.

CONTEMPT.

A court may fine a corporation for a violation of an injunction or order, although it may have been irregular. *The Mayor, &c., of New Jersey v. The New Jersey and Staten Island Ferry Co. et al.* 51

Injunction orders must be honestly and fairly obeyed; persons bound to obey them may be guilty of violating them as well by aiding, abetting and countenancing others in violating them as by doing it themselves. *Ib.*

It is too late on appeal to make the objection that interrogatories had not been filed before the adjudication upon the contempt. *Ib.*

Where there was an order to show cause in interrogatories are not necessary. *Ib.*

A sheriff who seizes goods in possession of a receiver, after a notice of the appointment of the latter by the court, is not protected by the process in his hands, unless it was issued by leave of the court. His seizure is a contempt of the order of the court, and subjects him and his assistants to punishment and restoration of the property. *The Commonwealth v. Young, sheriff et al.* 810

Even though the title of a claimant may be paramount to that of a receiver appointed by a court of equity, yet he will be guilty of contempt if he asserts his rights by taking possession, or by instituting an action without leave of the court. *Ib.*

Efforts to induce stockholders to consent to a lease of a portion of a company's property, is not a violation of an injunction forbidding the exercise of corporate privileges or interference with company's property. *The People ex rel. Southworth v. Sharpe.* 486

A second order of same nature in supplementary proceedings supersedes the first, and for disobeying first order party cannot be punished as for a contempt. *Gaylord v. Jones.* 481

A mortgagor is not guilty of contempt of court in selling the property of a bankrupt under a decree of the State Court for the foreclosure of the mortgage, which was entered before the adjudication of bankruptcy, nor in entering a judgment for deficiency on such sale. *In the matter of Irving.* 500

In a proceeding to punish for a contempt of court in violating an injunction, the court has jurisdiction to ascertain and include the amount of the costs and expenses of the proceeding as a part of the fine, and if it includes items not properly allowable, it is an erroneous decision merely, and not an excess of jurisdiction, which will render the commitment void. It cannot be reviewed on *habeas corpus*. *People ex. rel., Woolf v. Jacobs.* 507

CONTRACT.

Where a party, under a contract, agrees that no charge for extra work shall be made after he shall have given a certificate that all claims for work are included in the payment demanded when he delivers his certificate, is estopped from claiming for extra work after receipt of the payment so demanded. *Coulter v. Board of Education for the City and County of New York.* 7

The clerk of a board of school trustees has no authority to change the effect of such a certificate. *Ib.*

A contract whereby one party agrees to advance money to another with which to bet or wager, the proceeds of which are to be divided, is not illegal, and the latter will be compelled to account to the former in respect of money earned thereunder. *Beeston v. Beeston.* 24

When commissioners advertise for proposals for doing certain work, and party offers, in writing, to do it at prices named, and proposes names of two sureties, and offer and proposals are acceded to, and afterwards one of the sureties refuses to qualify, and another is offered and refused, the agreement is still "in fieri," and no action can be maintained to consummate the agreement or to recover. *Adams v. Loes et al.* 27

The parties are not obliged to accept any sureties but those first proposed. *Ib.*

Public officers are to consider character, &c., as well as pecuniary responsibility, in accepting sureties. *Ib.*

Where one of two persons employs a third to act in the joint interests of the two, representing that he is authorized to bind the other, he is liable individually to such third person. *Dennis v. Charlick, survivor.* 32

A contractor is liable to his sub-contractor for work done, although such work may be rejected by the party who originally let the contract; there being nothing in the agreement between the contractor and sub-contractor, which makes the approval of the work by the original party necessary. *Woodruff et. al. v. Hough et. al.* 77

When an employee under a contract for payment of money by installments for a term of service is discharged without cause, he can only recover for the amount that would have been due, had he continued in service, at the time the suit was instituted. *Hamiin v. Race.* 117

If, when discharged, he rescinds the contract, and then sues for its breach, it may be that he can recover for all the damages he sustained during the term by the breach, if the trial was had after the expiration of the term. *Ib.*

There need not be a total failure of consideration in order to entitle a party to recover for money had and received on breach of a contract. *Hawkins v. Mosher et al.* 153

Where, by the terms of a contract, a duty, though not by express covenant, is imposed on one of the parties to perform, and the other party has an interest in its performance, the law will imply a promise by the party to perform, and will sustain an action by the injured party to obtain compensation for a breach of it. *Booth v. The Cleveland Rolling Mill Co.* 180

Where a contract provides for two ways of ascertaining the value of certain property, one of them must be resorted to before an action for the value can be maintained. *Ib.*

A construction given to a contract claimed to restrict the right to build to the street line. *Clark v. The N. Y. Life Ins. & Trust Co. et al.* 269

Upon the sale of a business and its good will accompanied by an agreement not to carry on a similar business within certain limits, the vendor is bound not only not to solicit but to decline all business from customers within the prescribed limits. *Sander et al. v. Homan et al.* 270

A contract to sell and deliver potatoes and ship them on the cars, where the parties have had other dealings, is not satisfied by a delivery at the depot, and party cannot rescind because no one is at depot to pay for them. *Kester v. Reynolds.* 289

To justify the reformation of an instrument, except in cases of fraud, it must be established beyond doubt, by the proof, that the parties agreed to something different from what is expressed. *Meads et al. v. Westchester Fire Ins. Co.* 323

The instruments sued on in this case, held not to be instruments of writing for the payment of money, but contracts for the delivery of lime. *Gould et al. v. Richardson et al.* 347

The doctrine applied to simple contracts, executed by an agent for an unknown principal, that the principal is liable thereon, cannot be extended to contracts under seal. *Briggs et al. v. Partridge et al.* 371

Where, by the terms of a contract a day is named for its performance, and the parties subsequently, and before the maturity of the contract, agree upon a particular hour of the day named and a place for its performance, the latter agreement becomes a part of the original contract, and of the same effect as if therein contained. *Levy et al. v. Burgess.* 403

A contract between several parties to engage in the business of furnishing recruits under an anticipated call for volunteers for the army, and which fixes a minimum price at which they are to be furnished, is not against public policy. *Marsh et al. v. Russell et al.* 462

An agreement that in case buildings burn, one will pay the amount of the liens thereon, is not an agreement for the sale of lands. *Beach et al., trustees, v. Allen.* 463

Although an action cannot be maintained up-

on an executory contract, the consideration of which is immoral; when the contract has been executed, the law will not restore the parties to their former condition. *Fasig v. Levant et al.* 472

An agreement whereby, in consideration of an assignment by a debtor of all his estate to two of his creditors as trustees for the benefit of all the creditors, they agree, upon realization of the estate, to pay the debtor £50, made without the consent of the other creditors, is illegal as a fraud on their rights. *Blacklock v. Dobie et al.* 536

Under an agreement by a party, in consideration of the use and proceeds of a farm and title to same on decease of owner, to take care of owner and his family, &c., the death of such party terminates agreement, and his representatives cannot recover for his time and labor as improvements, but they can for what he originally brought on to the farm and its increase. *Fox et al., admr. v. Fox.* 551

As to the impairment of the obligations of a contract by statute or constitution, see CONSTITUTIONAL LAW.

As to supplying defects in contract by parol, see EVIDENCE.

As to power of a board of public officers to alter the terms of a contract, without reopening the bidding, see MUNICIPAL CORPORATIONS.

CONVERSION.

See ACTION.

CORPORATIONS.

A corporation having declared a dividend, "payable at such time as the board may direct," and credited it to the stockholders on the books, will be compelled, by a Court of Equity, at the suit of a stockholder, to pay within a reasonable time. *Beers et al. v. Bridgeport Spring Co.* 8

In so far as the dividends are concerned, the right of an individual stockholder is adverse to the corporation and to every other stockholder; they become his several and distinct property, which cannot be disposed of or dealt with by the corporation without his authority or consent. *Ib.*

Their application to the enhancement of the corporate business and property is unauthorized and constitutes no reason for the corporation's refusing to pay. *Ib.*

That the directors have ordered the dividends already declared to be transferred from the individual account of the stockholders to an account to be known as a Surplus Fund account, from which all dividends were to be paid, does not affect the rights of any stockholder not assenting thereto. *Ib.*

The directors of a corporation unreasonably refusing, may be compelled to declare a dividend by a Court of Equity, which may also protect the rights of the minority of the stockholders, where they are disregarded. *Ib.*

It is no defence to an action to recover an unpaid subscription, that there was a defect in the organization of the company, where there is a de facto corporation from which defendant may receive his stock. *The Cayuga Lake R. R. Co. v. Kyle.* 119

A member of a corporation may not bring an action individually for the distribution of funds belonging to the corporation but in the possession of a third party, without first showing the corporation's refusal to do so, or collusion. *O'Brien v. O'Connell et al.* 209

Members of a corporation having no proprietary interest in its capital, may be expelled therefrom for a violation of its by-laws. *The People ex rel. Pinckney et al. v. N. Y. Board of Fire Underwriters.* 321

A by-law of a corporation which compels members to submit all their business controversies to arbitration, and requires them to comply with the awards of the arbitrators, on pain of suspension or expulsion, is unreasonable, and hence void. *Seats ex rel. Kennedy v. Union Merchant's Exchange.* 337

A by-law will not be set aside as unreasonable, if there is any equipoise of opinion in the matter; its unreasonableness must be demonstrably shown. *Ib.*

A by-law made in pursuance of an express power in the charter to make such laws, is void, if contrary to the common law, or to a legal enactment. *Ib.*

A religious society, given by the legislature power to appoint trustees to hold its property, with right of succession to the trustees, are a corporation, and the property of the society is liable for the contracts of such trustees. *White v. Trustees of the Shakers.* 368

Proceedings under section 36 of art. 2d chap. 8, part 3d revised statutes, cannot be instituted against a dissolved or extinct corporation. *Lake Ontario Bank v. Onondaga County Bank.* 400

A corporation can only be dissolved voluntarily as provided by statute, and proceedings of the directors not in conformity, are a nullity. *Ib.*

Nothing but an act of the Legislature or the decree of a competent court can dissolve a corporation so as to affect suits, actions, &c. *Ib.*

Trustees of stock company may purchase property necessary for the business, and issue stock to the amount of the value thereof. *Delamater v. Rhodes.* 540

If the property has no definite value it must be estimated. *Ib.*

Proceedings under the statute for the voluntary dissolution of a corporation must conform strictly to the statute. *Chamberlain v. Rochester Seamless Paper Vessel Co.* 538

In an action brought by one corporation against trustees of another corporation to re-

cover by way of penalty for failing to file a certificate of the condition of such company, a debt incurred by the corporation of which the defendants were trustees, defendants may contest plaintiff's incorporation. *Bank of California v. Garth et al.* 593

As to power of officers of, to employ counsel, see ATTORNEY AND CLIENT.

As to liability of stockholders, see BANKRUPTCY.

As to liability for acts of agent, see PRINCIPAL AND AGENT.

COSTS.

A notice of appeal from a Justice's Court where the recovery was over one hundred dollars, to a County Court, which states as ground of appeal "that the Justice erred in finding that plaintiff rendered services in a sum exceeding in value the sum of twenty-five dollars," is sufficient to entitle the appealing party to costs in the County Court, if recovery therein is reduced more than ten dollars. *Groux v. McCrum.* 77

Where by section 306 of the Code, the Court has discretion as to costs, it may exercise that discretion at every stage of the action. *Chipman et al. v. Montgomery.* 107

The rule governing costs of cross appeals, applied to a particular case. *Ib.*

Under a stipulation to allow judgment in accordance with the determination of another suit, with costs, the same as if a trial had been had, it is proper to allow such costs as were appropriate up to the time of the stipulation and trial for issue of fact. *Audenreid et al. v. Wilson et al.* 138

A referee under the provisions of the 2 R. S. 39, §§36-7, cannot award costs against an unsuccessful claimant. *Hawkins v. Mosher et al.* 153

On recovery in an action of trespass, costs are allowed to plaintiff, of course. *Smith v. Ferris.* 163

Extra allowance should be granted only in cases that are both difficult and extraordinary. *Duncan v. Dewitt.* 199

If defendant counterclaims without serving offer to allow judgment for the excess of claim over counter-claim, plaintiff is not bound to enter judgment for such excess in order to avoid costs, but may test the counter claim, and if he recover \$50 is entitled to full costs. *Phelan et al. v. Collender.* 253

Where plaintiff's attorney taxed unlawful items in his bill of costs, a subsequent judgment creditor of the same debtor may apply by petition to have the costs readjusted, and the excess applied to his judgment. *Goodman et al. v. Guthman et al.* 333

The motion papers are properly served upon the first plaintiff's attorney. *Ib.*

Extra allowance of costs are in the discretion of the lower court. *Smith v. Smith.* 423

In an action to recover damages for the conversion of chattels, where plaintiff claimed \$500 and recovered \$35, defendant is entitled to costs. Plaintiff cannot by an excessive claim oust a justice of the peace of jurisdiction and thereby entitle himself to costs. The verdict is conclusive as to the amount in controversy, and in determining whether a justice of the peace would have jurisdiction. *Powers et al. v. Gross.* 561

As to allowances, see APPEAL; PRACTICE.

As to costs on motion to amend pleadings, see PRACTICE.

As to costs on foreclosure, see MORTGAGE.

COUPONS.

Coupons payable to bearer are promissory notes and negotiable, and their validity is not destroyed by being separated from the bonds. They are entitled to the benefit of the days of grace allowable on bills and notes payable at a given time. *Evertsen v. National Bank of Newport.* 574

COURTS.

The Justices of the District Courts, under the resolution of the Common Council, approved March 18, 1870, are authorized and empowered to appoint janitors for the District Courts. *McCullough v. The Mayor, &c., of New York.* 169

The provision of the charter, Chapter 335, Laws of 1873, Section 97, with reference to the Board of Apportionment fixing the salaries of, applies to public officials, not to mere servants or employees. *Ib.*

The Legislature may prescribe the form of proceedings in any court; such an act would not be limiting their jurisdiction. *Eno v. The Mayor, &c., of N. Y.* 362

New York City District Courts are not parts of the municipal government, and their officers are not included in the restrictive clause of the city charter (Sec. 114). *Goettman v. The Mayor, &c., of N. Y.* 482

Rents paid into court on application of plaintiffs and by consent of defendant, are subject to its control and discretion, and the court has power, in the exercise of its discretion, to award that they be paid over to the party to whom the judgment gave a right to them, subject to the rights of the other party. *Platt et al., ex'rs, v. Platt.* 588

As to court officers' salary, see SUPERVISORS.

COVENANTS.

See DEEDS.

CREDITOR'S BILLS.

To set aside a conveyance for fraud, absolute, positive evidence of fraud is not necessary; the fraud may be inferred from all the facts. *Ford v. Johnston.* 498

A conveyance made pending an action for tort

against the grantor, with intent to defeat a recovery, is fraudulent and void. *Ib.*

A judgment recovered on notes given to settle an action, the issue in which was joined before the execution of the mortgage, held sufficient to show an indebtedness prior to the making of the mortgage. *Stowell v. Haslett et al.* 523

As to setting aside conveyance where the consideration for it consisted of stale demands, see *Hale v. Stewart et al.* 505

CRIMINAL PRACTICE.

On an indictment charging a felony, the jury may acquit of the felony, and convict of the constituent misnemeanor. *Hunter et al. v. The Commonwealth.* 207

The Court of Oyer and Terminer will not ordinarily consider on motion to have recognizance declared forfeited, facts which go to the question merely as to whether the recognizance could be enforced, or whether certain facts constitute a valid defense in favor of the bail. *The People ex rel. Devlin v. Court of Oyer and Terminer.* 226

These are questions of fact for trial before a proper tribunal. *Ib.*

The office of the writ of error is to remove a criminal record from an inferior to a higher criminal jurisdiction. The county clerk should make return thereto. *The People v. Woodin.* 291

The writ of error should always contain the judgment record in form required §4 of article 1, chap. 2 revised statutes. *Ib.*

As to waiver of trial by jury, see WAIVER.

DAMAGES.

In an action for breach of the covenants of a lease whereby the lessor covenanted to erect and give possession of the demised premises, which were to be used for hotel purposes, at a specified time, and for which the lessee then owned and had on storage furniture sufficient to fill, and the lessor failed to give possession, the lessee is entitled to damages based upon the value of the use of the premises, as furnished, for hotel purposes. *Hoexter v. Knox.* 53

Under a lease providing that repairing shall be done by the lessor, the lessee, where the premises become untenable by reason of lessor's neglect, may recover damages for the whole time they are untenable; he is not limited to the time within which such repairs might have been made, inasmuch as he was not bound, although he had the right, to make them. *Ib.*

In an action to recover for injuries resulting from negligence, whether gross or ordinary, exemplary damages are not allowable. *The M. & St. P. R. R. v. Arms.* 66

The measure of damages in trover for conversion by an involuntary trespasser, is the market value of the property at the point where it

is sold by the trespasser, less the expense of getting it there. *Winchester v. Craig et al.* 78

Where it is not sold, or the market value does not cover the expense, the measure is its value when first taken, together with any profits that might be derived from its value in the ordinary market, with interest. *Ib.*

Under chapter 382 of the laws of 1870, the action of the Board of Audit was judicial in its nature, but the ordinary rule, that no action can be maintained against one acting in a judicial capacity, is not applicable when the defendant correctly agreed to make bills in which he was interested; proceedings before a party acting in such capacity, who is directly interested, are *coram non iudice*, and the party is not a judge. *The People v. Tweed et al.* 131

The damages in such an action are measured by the difference between the amount fraudulently drawn or paid and the amount which could honestly have been drawn or paid. *Ib.*

A party to a fraudulent combination to procure money is individually liable to the full extent of the moneys wrongfully abstracted, although they may have been partially received by others acting with him. *Ib.*

In an action against town supervisors for failure to place certain judgments upon the tax list as required by law, the damages in the absence of proof of actual, are limited to nominal damages; the supervisors do not become debtors for the full amount of the judgments. *Dow v. Humbert et al.* 185

Where a mill-owner has a right to the use of a reservoir and dam, the fee belonging to a third person, and is charged with the duty of maintaining the dam, and a riparian proprietor below erects a dam which sets the water back upon the reservoir dam, he can recover only for the injury to his easement. *Robertson v. Woodworth.* 200

A diminished benefit from the use of the reservoir, or an increase of the cost and trouble in keeping the dam in repair, or an obstruction of the plaintiff in his right of repairing, would constitute such an injury. *Ib.*

The owner of land at the time the change of grade is in fact completed is the person who is damaged, and is the person who is entitled to the award for damages done to property by change of grade. *The People ex rel. Kureman v. Green et al.* 206

In the absence of fraud or mistake the amount agreed upon between parties to a contract as to deductions for defects must stand, and the fact that they were unreasonable makes no difference. *Steele et al. v. Lord.* 225

In an action under the Civil Damage Act to support a finding of exemplary damages, there must be a finding of actual damage, and without this, exemplary damages cannot be awarded. *Roth v. Eppy.* 596

As to measure of damages in actions for fraud in sales, see FRAUDS.

As to exemplary damages for acts of agent, see PRINCIPAL AND AGENT.

As to damages for breach of warranty, see WARRANTY.

DEBTOR AND CREDITOR.

If a creditor has a lawful and *bona fide* debt, it is lawful for the debtor to turn over to the creditor any of his personal property as security for said debt, if the creditor takes immediate possession and continues such possession. *Arch-er v. O'Brien, sheriff.* 209

If the creditor make any arrangement to protect the debtor by holding the property for some purpose other than the payment of his demand, he loses all advantage by the unlawful combination. *Ib.*

Where a third person purchases from certain creditors of a failing debtor his debts at a stipulated per centum, and takes an assignment to himself, and such third person acts, not as agent for the debtor, but purely in his own behalf, the debts are not compromised in such manner that one creditor can enforce any balance of the indebtedness by proving simply that some other creditors received more than himself upon the sale of his claim. *Goldenberg et al. v. Hoffman et al.* 372

Where the appointment of a receiver has prevented a levy by a creditor, his rights will be protected, and he will be permitted to show, without actual levy, that another creditor's security is void. *Stewart v. Beale et al.* 513

As to rights of secured creditor of bankrupt, see BANKRUPTCY.

DEEDS.

A covenant against incumbrances, in a deed, is a covenant *in present*, and there can be no breach unless an action thereon would lie at once. *Barlow v. the St. Nicholas National Bank of N. Y.* 28

The entry of the land in the assessment roll is not an imposition of a charge upon the land. *Ib.*

A grantee claiming under a deed describing the land as commencing at the intersection of the exterior lines of two streets takes only to such exterior lines; the point thus fixed is as controlling as any monument would have been, and necessarily excludes the soil of the street. *White's Bank of Buffalo v. Nichols.* 54

Where the grant contains no evidence that the parties contemplated a shifting boundary, the fact that the street is subsequently narrowed so as to remove its exterior line towards its center, does not enlarge the area of the lots granted: their lines are fixed permanently, and cannot be changed to conform to any altered condition or circumstances. *Ib.*

The presumption is that the grantor does not intend to retain the fee of the soil of the street, but such presumption may be overcome by the

use of any terms in describing the premises granted which may indicate an intent not to convey. *Ib.*

What will not exclude from the operation of a grant the soil of a street, stated. *Ib.*

A deed of conveyance executed under a power of attorney, and apparently within its scope, is presumed to be valid. *Clement v. Macheboeuf et al.* 66

A mistake in a deed can be corrected as between the parties to the conveyance, but not as against a *bona fide* purchaser without notice. *Caster v. Sitts et al.* 92

Where the vendor agrees to sell land and execute a deed, which he knows does not, and which he knows the vendee believes does convey the whole of the land, the vendor will be decreed to convey the residue. *Beardsley v. Duntley.* 490

The fact that demands, in consideration of which a certain conveyance was made were stale, does not render the conveyance fraudulent and void as to creditors; the demands being *bona fide*. *Hale, rec'r. v. Stewart et al.* 505

Where the debts which are the consideration of alleged fraudulent conveyances are *bona fide*, very strong evidence will be required to show that the conveyances themselves are fraudulent. *Niles v. Fish et al.* 150

As to effect of covenant against incumbrances where assessment has been levied, see ASSESSMENT.

As to fraudulent deeds, see CREDITOR'S BILL

DEFENCE.

In an action brought under Chapter 49 of the Laws of 1875, it is no defence that some of the warrants issued by the county authorities upon the bank where the public money was deposited, were not endorsed by the payees, if the defendant procured the money thereon; it makes no difference that the plaintiffs have a remedy against the bank also. *The People v. Tweed et al.* 131

In an action for negligently and carelessly ejecting plaintiff from a railway car, whereby he was unnecessarily injured, it is no defence that he was a trespasser upon the car. *Rounds v. The D. L. & W. R.R. Co.* 260

The pendency of a foreign attachment against the payee of a note in which defendant is made garnishee, is no defence to a suit by the holder against the maker. *Bank v. Marquis.* 288

In an action against the City of New York to recover the contract price of material actually delivered to and used by the defendant, for the construction of sewers, which contract was made with the Commissioners of Public Works, in April, 1871, it is no defence that there was no ordinance of the Common Council directing the contract, or other proof that the Commissioner was authorized by defendant to make the contract. *Nelson v. The Mayor, &c. of N. Y.* 313

See PRACTICE ; NEGOTIABLE PAPER.

DELIVERY.

As to what will constitute a good delivery, see CONTRACT.

DEPOSITIONS.

See PRACTICE.

DISCONTINUANCE.

See PRACTICE.

DISORDERLY HOUSES.

A house of prostitution wherein there is fighting and drinking is within the statutory provision for disorderly house. *Jacobowski v. The People.* 10

DIVORCE.

Obstinate silence, laziness, or wilful neglect of household duties on the part of a wife, do not constitute cruel and barbarous treatment as a ground for divorce within the meaning of the Act of May 8, 1854. *Harris v. Harris* 120

Where a husband writes a letter to an absent wife, who is residing with her parents, that he will not receive her, and she does not return and try to obtain admission, it is not such a turning out of doors as will entitle her to a divorce. *Sowers v. Sowers.* 548

As to admissibility of affidavit of party on motion to set aside decree of, see PRACTICE.

As to evidence in actions for, see EVIDENCE.

DOWER.

A right of dower is not divested by the mere finding of the referee that the wife has been guilty of adultery; it can only be done by a judgment of divorce granted upon such finding. *Schiffer v. Pruden.* 11

An agreement releasing a married woman's right of dower made after marriage, will be declared void in equity, where it appears to be a fraud upon her rights, unequal and unjust, and executed under suspicious circumstances. *Campbell et al. v. Hammett.* 204

DURESS.

See PAYMENT.

EASEMENTS.

Nothing short of an intention to abandon an easement will operate to extinguish it, unless other persons have been led by the acts of the owners of the easement to treat the servient estate as if free from the servitude. *White's Bank of Buffalo v. Nichols,* 54

The lease of a building in the rear of which is a yard, from which the lessee receives light and air, passes the use of the yard as an appurtenant, and an action may be maintained by the lessee restraining any interference with or obstruction of the easement so required. *Doyle et al. v. Lord et al.* 367

As to measures of damages in an action for setting back water by a mill dam, see DAMAGES.

EJECTMENT.

A command in a writ of possession to return it within sixty days is directory only. The office of the writ is to carry the judgment into effect and can be executed after the return day. *Whitbeck v. Van Rensselaer et al.* 20

A failure to remove the personal property does not vitiate the execution of the writ, provided the possession is delivered. *Ib.*

A re-entry by the tenant will not enlarge the time for redemption. *Ib.*

In ejectment, the value of the land is immaterial. *Sullivan v. Vail.* 110

Covenants in a lease that if lessee keeps his covenants lessor will, at expiration, pay lesser value of any buildings that he may erect on demised property, do not prevent lessor from instituting summary proceedings against lessee for non-payment of rent. *Paine v. The Rector, &c., of Trinity Church.* 214

As to evidence in ejectment, see EVIDENCE.

As to practice in ejectment suits, see PRACTICE.

EMBEZZLEMENT.

Evidence showing that an employer, being suspicious that some one was embezzling his money, caused one of his customers to mark some money with which to pay his bill, that a clerk collected the bill and divided the money with the accused, and that the money was found on the latter when arrested, is sufficient to establish the crime of embezzlement. *In the matter of Swan.* 114

EMINENT DOMAIN.

As to damages for taking lands for public use, see AWARD.

ENDORSERS.

See NEGOTIABLE PAPER.

EQUITY.

Money paid for land purchased at an auction sale may be recovered back upon the discovery that the grantors in the deed could not give a valid title to the premises. *Brunner v. Meigs et al. trustees, &c.* 70-553

An action by the people will not lie to set aside, or restrain the enforcement of an award made by the canal appraisers. *The People v. Wasson. impld., &c.* 104

Where the title to real property fails, a purchaser without covenants, no fraud or deceit being alleged, has no remedy in equity to recover the price. *Whittemor v. Furrington.* 446

Where possession has passed and continued without eviction, there is no case for relief. *Ib.*

An agreement for the sale of a portion of the real estate having been made by the trustees, a suit in equity to rescind the agreement can be maintained as an action to recover money paid upon a consideration which has failed, the title not being such as the purchaser is bound to accept. *Brunner v. Meigs et al. trustees.* 553

As to what cases constitute grounds for relief coming under distinct heads of equitable jurisprudence, see those titles, chiefly FRAUD; INJUNCTION; MORTGAGES; PARTNERSHIP; SPECIFIC PERFORMANCE.

As to when equity will relieve against forfeiture for breach of covenant in lease, see LANDLORD AND TENANT.

ESTOPPEL.

The fact that interest has been paid and a special tax voted to meet the future interest upon void bonds, does not estop a municipal corporation from denying the validity of the bonds. *Weisner v. Village of Douglas.* 50

A doubtful or disputed boundary line may be agreed upon by parol; and a party so agreeing is afterwards estopped from denying the same, if the other, relying upon it, erects improvements. *Burt v. Creppel.* 249

The fact that a surety stands by and sees the holder of his obligation do something which will discharge him from his contract, without declaring that he shall consider himself discharged if the act is done, does not estop him from setting up and relying upon such act as a discharge. He is not bound to warn the parties of the consequences of the alteration of the contract. *Polak v. Eccrett.* 385

A certificate signed by a mortgagor making certain declarations with reference to the validity of the mortgage is no estoppel as against the mortgagor, where it is not taken in good faith, and reliance placed on its statements, and evidence is always admissible to show whether it was so taken. *Dinkelspiel et al. v. Franklin et al.* 396

Accommodation endorsers are not estopped from interposing defence of usury, although the maker has executed a writing which estops him. *Meeker v. Gaylord et al.* 441

Where a party authorizes his warehouseman to deliver a receipt for goods to one to whom he has sold them, he is estopped from claiming payment as a condition precedent to parting with the title, as against one who has advanced money to the vendee, relying on the receipt as showing title in such vendee. *Vorhees et al. v. Olmstead et al.* 449

Where a person really having the title to land, allows another having the apparent title to go on and do certain acts, such person is estopped from questioning such acts. *O'Dougherty v. Remington.* 461

A sheriff may be estopped from setting up claims to property he has levied upon by execution, by his acts and declarations inconsistent with the levy. *Clark v. Hodgkins.* 509

The judgment of a court of competent jurisdiction upon a question directly at issue between the parties, unless reversed, forever concludes and estops all parties to the action, and those in privity with them, from questioning its accuracy or justice in another action. *The People v. Stephens et al.* 515

Where a contract has been obtained by fraud or an illegal combination, the party for whom the work is to be done cannot insist upon its performance, voluntarily and with full knowledge pay the stipulated price, and then in an action recover his damages. *Ib.*

A party having, for a valuable consideration given another the right to run pipes over his land for the purpose of conveying the water of a brook, is estopped from questioning such other's right to such water. But where a party lays certain sized pipes and uses them for some time, he cannot replace them by larger ones without being liable for damages for excess of water taken. *Outhank v. The L. S. & M. S. R. R. Co.* 557

Where insured has knowledge of the limitation of an agent's authority, he is estopped from claiming that the agent could contract with him so as to change the terms of the policy or waive performance of its conditions. *Merserau v. Phoenix Life Ins. Co.* 584

See ADVANCEMENTS.

As to estoppel from claiming for extra work under a contract, see CONTRACT.

EVIDENCE.

Defendant's admissions of debt in preliminary examination do not conclude him under a subsequently amended answer from showing that the debt never in fact existed. *The New York Dyeing and Printing Establishment v. Berdell.* 12

Introduction of individual's private books and papers by one side renders them competent as evidence for the other side. *Ib.*

Where there are slight circumstances tending to establish the bad faith of a purchase, it cannot be said by an Appellate Court that it was not sufficient for the purpose. *Salamon v. Van Praag.* 28

In an action against the vendor to recover brokerage on a sale of real estate, evidence that plaintiff was acting in the interests of the buyer is admissible. *Miller v. Irish et al.* 49

Upon the trial of an indictment for murder, it is competent for the prosecution to show, as bearing upon the question of motive, that deceased had attended court several times with a party against whom the prisoner was prosecuting several suits, and the objection that parol

evidence of the nature of the suits could not be given is not available on appeal. *Murphy v. The People.* 57

A statement made by the prisoner, shortly after the murder, and while he was in custody of the Sheriff, in response to the question, "do you desire to make any statement," is voluntary. *Ib.*

Parol evidence of a consideration not mentioned in a deed, if it be not inconsistent with that expressed, is admissible. *Taylor et al. v. Preston.* 68

The burden of proof is upon an assignee of a debt, to establish that the debtor was notified of the assignment in order to protect himself against payment to the assignor. *Heermans, trustee, v. Ellsworth.* 76

In an action upon a note where the defense is forgery, other notes and checks of defendants, tending to connect defendant with the origin of the debt for which the note in suit was given are admissible in evidence. *Marks v. King.* 79

Where a former judgment is pleaded in bar, extrinsic evidence that the claim in suit was not included in the judgment is admissible. *Kerby v. Daly.* 102

Evidence that warrants were issued for legal claims against the county, is admissible so long as the bonds were invalid for want of a seal. *Smeltzer v. White.* 106

Diary of physician cannot be offered in evidence without conforming to the rule relative to books of account. *Knight v. Cummington et al., admrs.* 116

In an action by a bank against A to recover a balance due on an overdrawn account standing in the name of B, parol evidence tending to show that A was the real borrower, is admissible. *Lefevre v. The Farmers & Mechanics Bank of Shippensburg.* 129

Books produced on notice by opposing counsel are competent as evidence. *Mitchell v. Bunn.* 149

Where one of a set of books, containing entries in brief and referring to other books for a fuller explanation, is received in evidence, it is competent to refer to the entries in such other books referred to, and such entries are competent evidence. *Ib.*

Where the books of defendant's firm, in which is an item debiting plaintiff with the note in suit, is introduced in evidence to charge defendant with personal knowledge of its issue, it is competent for him to testify that he had no such knowledge at the time, or until long afterwards. *Ib.*

Where a person stands by and overhears a conversation between a deceased person and his wife it is not a personal one under the statute. *Benedict v. Phelps.* 150

In an action for malicious prosecution evi-

dence of plaintiff's sufferings from cold, hunger, &c., in the prison is admissible, and the jury should consider them in assessing damages. *Abrahams v. Cooper.* 155

Parol declarations are admissible as against an alleged vendor, and his heirs and grantees, to prove that the vendee has paid the purchase money. *Chadwick v. Fanner* 197

In an action of ejectment, evidence tending to show an acquiescence in and practical location of a boundary line for more than twenty years is admissible, although such line is not the true line described in plaintiff's grant. *Jones et al. v. Smith.* 200

A witness being interrogated as to a conversation with B., and B. being called, testified to a particular conversation with witness, the witness can be recalled to deny specifically the alleged conversation testified to by B. *Ib.*

Parol evidence of drafts lost or destroyed is admissible unless such loss or destruction was intentional and fraudulent. *Steele et al. v. Lord.* 225

Proof of a custom is competent to explain the conduct of parties to a contract. *The Standard Oil Co. v. The Turnpike Ins. Co.* 235

Judgment will be reversed on account of admitting, under objection, parole evidence of a writing without satisfactorily accounting for its non-production. *Rostern v. Dodd.* 239

Testimony of physicians as to knowledge of diseases obtained in their professional capacity, and necessary to enable them to prescribe, is inadmissible. *Dilleber v. Home Life Ins. Co.* 240

Letters written by the assured are admissible to show false statements, or concealment of facts affecting his insurability, which he was bound to disclose. *Ib.*

Under §399 of the code the owner of chattels is not permitted to prove by his vendor that a demand for the possession of such chattels was made by such vendor as the agent of the owner of the deceased partner of one in possession of such chattels. *Conway v. Moulton.* 242

In an action on a note of \$450, evidence that a short time prior to the giving of the note the payee stated he was working for \$1.50 per day, and could not raise \$100, was competent to raise question of plaintiff's (the payee's) "bona fides." *Nicholson v. Wafu.* 250

Upon an issue as to whether defendant was the owner of a stock of goods which he claimed he had sold by verbal agreement, conversations between defendant and the alleged vendee, at the time the property was sold, are competent evidence. *Clark v. Donaldson.* 258

Evidence improperly received must work an injury to justify a reversal. *Ib.*

Where evidence which has been erroneously rejected is afterwards admitted the error is obviated. *Ib.*

It is an error under the 399th § of the code, to

allow the plaintiff as a witness in the case, to show that the testator had not paid a promissory note in his life time. *Howell v. Van Sicklen, exr., et al.* 273

And in the case where the question is permitted under objection and exception, the court will reverse the judgment although the plaintiff might have safely rested his case without the evidence. *Ib.*

A party has a right before offering any evidence of his defense to stand upon his objection and exception to illegal evidence, for the purpose of having same stricken from the case. *Ib.*

In an action upon a life insurance policy, where the defense is that the assured made false answers to questions is his application, the defendant must prove their falsity; it is not for the plaintiff to prove his answers true. *The Piedmont & Arlington Life Ins. Co. v. Ewing, admr.* 276

In an action for rent, evidence of how defendant occupied other houses than one in suit inadmissible. *Roberts v. Heap.* 292

The rules of evidence are entirely within the control of the legislature, which may make such rules and regulations in regard thereto as it deems best. *Howard et al v. Moot.* 297

A will having been admitted to probate, it can only be impeached by direct proof of incapacity, as competency will be presumed until the contrary is shown. *Ib.*

In an action on a lease, when eviction is set up as a defense, evidence tending to show that the act constituting the eviction was done by the lessor, and not a third party, admissible. *Richards v. Carlton.* 326

In an action by the payee of a note against one of two makers, parol evidence is admissible to show that defendant signed the note as surety. *Hubbard v. Gurney.* 335

An assignment of a charter party may be shown by parol unless it appears that the assignment was in writing. *Phillips v. Pace.* 350

To be admissible in evidence a notary's certificate of protest must be under a seal made by an impression directly upon the paper, or upon wafer, wax, or some similar substance, a mere imprint is not sufficient. *Richards v. Boller.* 353

In an action for false imprisonment where exemplary or punitive damages are claimed, all the circumstances connected with the transaction tending to explain the motive of defendant, are admissible in evidence. *Voltz v. Blackmar.* 355

Evidence that defendant's agent knowingly employed a switchman who was intemperate and incompetent is admissible on question of positive punitive damages. Courts rarely exercise this right to grant a new trial on the ground of excessive damages. *Cleghorn v. The N. Y. C. and H. R. R. Co.* 358

Authority by a father to a son to endorse notes,

&c., need not be expressly proved; it may be proved by implication or custom. *Abel v. Seymour*. 361

The range of evidence is necessarily very wide where the issue is fraud; and the same latitude will be shown whether the testimony tends to establish or rebut the fact. *Stewart v. Fenner*. 402

A debtor conveyed all his real estate to his sister. The *bona fides* of the transaction being at issue, the sister offered to prove that after the conveyance she improved the property at her own expense.

Held, That the offer should have been admitted. *Ib.*

The provisions of § 8, chap. 276, of the Laws of 1832, are restricted by Sec. 399 of the Code. *Alexander, ex r. v Dutcher*. 415

Evidence to show that payment of money was involuntarily is admissible where the fact is material and is put in issue by the pleadings. *Scholey ex r. v. Mumford et al.* 419

Where a plaintiff proves a part of a transaction, the defendant, even under a general denial, can prove the whole transaction. *Manning v. Eckert et al.* 420

Evidence to repel a presumption is not evidence to prove new matter. *Ib.*

When upon the trial at a circuit a circumstance or fact appears inconsistent with the defence, evidence explanatory of such fact is proper. *Genet v. The Mayor, &c., of N. Y.* 437

Evidence that the judgment debtor believed the note paid upon which judgment was recovered, is competent upon the question of intent in an action to set aside an assignment by him as fraudulent. *Stacy recr. v. Desham et al.* 468

The value of the assigned property may always be shown. *Ib.*

Services are a good consideration for such an assignment. *Ib.*

Admissions of the vendor made subsequent to the execution of the deed are competent to show fraud in the description. *Beardsley v. Duntley*. 490

A parol agreement between an ancestor and a third person by which, for a consideration, the former agrees to sell and convey certain real estate to the latter, when performed, binds the heirs of the vendor. Admissions of ancestors are admissible to establish such agreement. *Knapp v. Hungerford et al.* 490

Declarations of a pastor are not competent evidence, unless he is shown to be the agent of the society, and that such declarations are within the scope of his agency. *First Unitarian Society v Faulkner et al.* 493

The presiding judge may exercise his discretion as to the order in which the evidence may be given. *Ib.*

In an action upon a policy of fire insurance no objection having been made to the proofs of loss either as to form, sufficiency, or time of service, but same having been retained, these facts operate as a complete waiver of all objections to the proof and of all other preliminaries. *Brink et al. v. Hanover Fire Ins. Co.* 494

Declarations of an agent of an insurance company of the result of his investigations, are admissible in an action upon the policy. *Ib.*

When a verdict is directed for plaintiff on the trial, it is unimportant to consider the exceptions to evidence, if there be in fact such contradicted, and unexceptionable evidence, that it was the duty of the court to direct a verdict upon that alone. *Parker v. McCunn, ex'r x. et al.* 502

Attorney for plaintiff has not, for that reason alone, such interest as would exclude his testimony as to admissions made by defendant's testator, under section 399 of the Code. *Ib.*

Letters of administration are not admissible to show the death of the assured, in a suit brought in an individual character. *Mutual Benefit Life Ins. Co. v. Tisdale*. 506

When a party testifies that he has paid the claim of a third person to other parties who had purchased it; it is not proper to ask such third person how much he received from such party. *Wintingham v. Dobbie, assignee*. 512

Where the plaintiff belongs to the first class of preferred creditors, a question as to how much was paid upon claims in the second class is immaterial. *Ib.*

Declarations of a party made before giving a mortgage are admissible as evidence against him. *Stowell v. Hazlett et al.* 523

The testimony of a defendant given on a former trial of the same action may be given in evidence against him. *Ib.*

Where the written contract of parties is apparently incomplete, evidence may be given, showing the further stipulation entered into by them. *Tracy et al. v. Watson*. 524

Evidence of experts is only necessary when the question at issue involves a peculiar science or skill. But where the question is one involving merely matters of common sense, evidence of experts is incompetent. *Swartwout v. The N. Y. C. & H. R. R. Co.* 536

Evidence, although admitted, will not be allowed to impeach a witness, unless some foundation is first laid for it, by calling the attention of the witness that is sought to be impeached to the time when and place where the conversation occurred that is introduced as impeaching testimony. *Gorgen v. Balzhous. r et al.* 529

Evidence that defendant had been accustomed to keep a flagman at a crossing, although incompetent, must be objected to, or it can properly be considered by the jury. *Zimmer v. The N. Y. C. & H. R. R. Co.* 531

In an action for an alleged conversion of goods, where the defence is a sale of said goods, and defendants rely upon a letter of plaintiff in relation thereto, containing the words:—"By amounts received on account, \$32,372.63," evidence tending to show that this sum was an indebtedness of plaintiff to defendants in other transactions, which he was willing to apply in payment for the goods, is material and admissible, as it would destroy the effect of the acknowledgment in the letter as an admission of a consummated sale, and the receipt of payments on account. *Richard v. Wellington et al.* 537

When money is sued for as a loan, for which a receipt had been given, it is competent to show that it was not a loan, but a deposit for a specific purpose. *Southwick v. Mudgett.* 541

In action on a note it is competent to show a want of consideration. *Ib.*

Evidence is admissible to confirm oral testimony as to the terms of a contract. There is no valid objection where an oral contract has been made to prove that a memorandum of its principal terms was made and read to the parties at the time. *Lathrop et al. v. Bramhall. admr. et al.* 545

In an accounting between partners it is competent to show by witnesses doing the same kind of business as the partners, the amount of business done by such partners and the profits arising therefrom, as against one of the partners who kept the books of the partnership in so careless a manner that a proper accounting cannot be had from them. *McCa'll v. Heditch.* 558

In action for divorce on the ground of cruelty, bruises and marks observed and sworn to by witnesses are competent testimony in confirmation of the evidence given by the complainant. *Berdel v. Berdel.* 581

Evidence of complainant's good character, her character not being at issue, is inadmissible. *Ib.*

An agent of an express company may receipt for goods, and such agent's signature may be proved by some one who, in regular course of business, has received such receipts and knows such agent's hand-writing. *Armstrong v. American Ex. Co.* 595

Evidence is admissible to show how a person came to sign a contract in an unusual place or what his relations were to the contract. *Hauch v. Craighead et al. exrs. et al.* 594

In an action by a wife for damages in consequence of the habitual intoxication of her husband, caused by defendant selling him liquor, as bearing upon the question of damages, it was proper to show any want of, and inability to, obtain employment, in consequence of his previous habits of intoxication. *Roth v. Eppy.* 596

As to admissibility of exemplification of bankruptcy record, see BANKRUPTCY.

As to granting new trial for improper admission or rejection of evidence, or for verdict against evidence, see NEW TRIAL; PRACTICE.

As to evidence in actions under the statute against innkeepers, see INNKEEPERS.

As to evidence on reference, see REFEREES.

EXAMINATION OF PARTIES.

See PRACTICE.

EXCEPTIONS.

See PRACTICE.

EXECUTION.

In an action to set aside a mortgage as void for usury, if the plaintiff succeeds in obtaining judgment for relief and costs, an execution against the body of the defendant is justifiable; the action sounding in tort, being based on the fraud of the defendant. *Bieler v. Reh.* 100

Under a mortgage upon railroad property, which purported to mortgage the income and earnings of the road, the mortgagee has no lien upon the income fund, which will prevent a judgment creditor from levying upon it under an execution. *Gilman et al. v. The Ill. & Miss. Tel. Co. et al.* 103

An execution against the estate of a deceased debtor is irregular and void unless the proper proceedings as authorized by section 376 of the code have been had, and a sale thereunder passes no title. *Wallace v. Swinton.* 246

Chapter 295 of the laws of 1850, and section 376 of the code not being entirely repugnant, may both stand. *Ib.*

EXECUTORS AND ADMINISTRATORS.

An executor cannot recover an award for land of the testator taken for public purposes unless it appears by the will that such executor had some right to the possession of the land, either as trustee under the will or for the purposes of administration. *Cashman, ex'r, v. Wood.* 13

In the absence of such allegations in the complaint, the complaint is demurrable for the reason that the land, or money awarded for it, is vested in the heirs at law of the testator. *Ib.*

In absence of proof to the contrary, administrator is presumed to have paid only such debts as were properly proved. *Harvey, adm'r. &c., v. Burnham.* 25

Special administrators appointed in another state, should contest claims of creditors being in that state, and not the general administrator here. *Ib.*

Release of a security does not affect the indebtedness it was given to secure. *Ib.*

An executor will not be surcharged, as respects legatees and next of kin, with the cost of a monument over his testator which is reasonable, accords with the means and position of the testator, and has been approved by the majority of said legatees and next of kin. *Estate of Bar. clay.* 179

But the cost of improvement and inclosure of burial lot will not be allowed an executor as respects objecting parties in interest. *Ib.*

A delivery by testator to his executor of certain money to be distributed among his servants, which was so distributed after his death, constitutes valid *donationes causa mortis*. *Ib.*

Where an executor is likewise trustee he is allowed but one commission for both capacities. *Ib.*

Where an executor is allowed by the terms of the will 6 per cent. commission for all money collected by him, the term collection will be construed in its strict and distinctive sense, and will not be held to include moneys received by the executor as the proceeds of a sale of property belonging to the estate, unless it plainly appears that such was the intention of the testator. *Ireland v. Corse et al.* 394

On a judgment recovered in a foreign country the administrators of the deceased judgment creditor may maintain an action in their own names in this State. *Nichols v. Smith.* 471

EXEMPTION.

The fact that premises from the proceeds of the sale of which the property in suit was bought was declared a homestead, &c., does not exempt this land. *Ford v. Johnson.* 498

EXPERTS.

See EVIDENCE.

FALSE IMPRISONMENT.

As to what proof is admissible in actions for, see EVIDENCE.

FEEES.

Any agreement, express or implied, to pay a county clerk more than the statutory fees for recording a deed, mortgage or other homogeneous instrument is illegal and void; nor can this result be evaded by means of an account stated. *Curtiss, ex'r, v. McNair.* 369

The fees of county clerk for searching are governed by the Revised Statutes, and not by the Act of 1840, chap. 342. *Ib.*

FIRE INSURANCE.

The authority of an agent to receive proposals for insurance and countersign and deliver policies, cannot be held to extend to adjusting losses or waiving proofs of loss, and binding the company to pay without them. *Bush v. The Westchester Fire Insurance Co.* 31

A substantive compliance with conditions of policy as to proof of loss, unless waived, is necessary to entitle the insured to recover.—*Ransom v. Lycoming Fire Ins. Co.* 61

The company may reject a claim on the ground that the proof of loss was too late, and that the insurance was fraudulently obtained; it is not bad for duplicity. *Ib.*

An insurance policy containing a provision that "if the building shall fall, except as the result of fire, all insurance by this company shall immediately cease and determine," continues in full force where the building, although removed from its foundation by the violence of a tempest, and greatly damaged, is still intact as a building. *The Fireman's Fund Ins. Co. v. The Congregation of Rodeph Sholem.* 99

Where a party accepts a policy containing the words "Occupied as a dwelling," it amounts to a warranty that the premises are occupied, and if the policy provided "if the premises became vacant and unoccupied the policy should be void," and they were actually unoccupied when the insurance was effected, it avoids the policy, and knowledge upon the part of the company's agent that the premises were vacant, does not affect its validity. *Alexander v. Germania Ins. Co.* 175

An agreement in a policy that any person other than the assured, who procures the insurance, should be deemed the agent of the assured is operative. *Ib.*

A general agent may waive by parol a condition of a policy even where the policy provides that the waiver must be in writing. *Arkell v. Commerce Ins. Co.* 372

A company held to be bound by acts of an agent after surrender of his agency, the insured being ignorant of such surrender. *Ib.*

Where a policy in its terms requires that in case of loss notice of loss shall be given forthwith, a notice given twenty-three days after the loss is in time. *Lycoming Mutual Fire Ins. Co. v. Bedford.* 444

Payment of the premium at the time of making a contract of insurance is not necessary to bind the company; and if a credit is given by the agent, the contract is equally obligatory. *Church v. Lafayette Fire Ins. Co.* 473

An agent may waive such payment and give such credit. *Ib.*

The question of waiver is for the jury to determine. *Ib.*

A condition in a policy that if the premises shall become vacant or unoccupied and so remain with the knowledge of the assured, without notice to and consent of the company in writing, the policy should be void, contemplates an abandonment of the premises as tenantable property or vacancy for an unreasonable time. *Kelly v. Home Ins. Co.* 479

As to evidence in actions on policies of fire insurance, see EVIDENCE.

As to liability of insurance companies for the acts of their agents, see PRINCIPAL AND AGENT.

As to right of insurance agent to waive compliance with conditions of policy, see WAIVER.

As to insurable interest of a general agent, see PRINCIPAL AND AGENT.

FIXTURES.

An owner of personal property cannot, against his will, be deprived of the title to the same, by having it attached without his consent, to the real estate of another, by a third person, where such personal property can be removed from such real estate without any great inconvenience, and without any substantial injury to the real estate. *Shoemaker et al. v. Simpson.* 93

Gas fixtures, chandeliers and brackets, do not pass with the sale of a house to the purchaser. *Jarechi et al. v. The Philharmonic Society.* 153

FORECLOSURE.

See MORTGAGE.

FOREIGN JUDGMENT.

Prima facie a Superior Court of another State has jurisdiction over the subject matter of a judgment pronounced by it. *Loury v. Guthrie.* 153

When the record of such a court shows jurisdiction, *e. g.*, that the party against whom judgment was finally pronounced had himself previously instituted proceedings by filing a bill against other parties, and that all parties appeared before the court by counsel, it is (in the absence of any allegation of fraud) conclusive, and cannot be contradicted by parol evidence in a collateral proceeding in this State. *Ib.*

FRAUDS.

In exchange of chattels, if one party make false representations as to condition of his property, the other in action for fraud is entitled to recover damages, although he has received full value for his articles. *Murray v. Jennings.* 14

Measure of damage, the difference between actual value and value as represented. *Ib.*

Where one of two innocent persons must suffer by the fraud of the third, whichever has accredited him must bear the loss. *Aull et al. v. Coiket et al.* 30

A party induced by fraud to make a purchase of property, and to take a warranty therefor in writing, and under seal, may disregard the latter, sue directly for the fraud, and give parol evidence of the fraudulent representations. *Indianapolis P. & C. R.R. Co. v. Tyng.* 80

In fixing the value of such property as a locomotive engine, the whole country is but a single market. *Ib.*

Where the grounds of the action are false statements made by defendant, with intent to deceive, it is necessary that it should appear by affirmative proof that the defendants knew the representations to be false. *Marshall v. Fowler et al.* 274

Fraud will not be presumed or conjectured. *Ib.*

Where sale is influenced by fraudulent representations, even though on credit, it is unnecessary to allege fraud in complaint. *Clafin et al. v. Taussig et al.* 317

Seller may terminate the credit and sue on the debt at once. *Ib.*

Equity may decree the delivery up and cancellation of deeds and other writings procured by fraud, and will enjoin their transfer or disposition pending the suit. *The Globe Mutual Life Ins. Co. v. Reals et al.* 360

A mere purchase of goods, unaccompanied by any fraudulent representations, is not of itself fraudulent, although the purchaser is insolvent at the time, and has knowledge of the fact. *Fish et al. v. Payne.* 477

As to effect of fraud in obtaining renewal of policy, see LIFE INSURANCE.

As to evidence in cases of, see EVIDENCE.

FRAUDULENT CONVEYANCE.

In setting aside a conveyance procured by fraud, equity will allow the purchaser to receive back only the identical property by which he effected the bargain, whether it has greatly depreciated in value or not; and even if it has become worthless. *Neblett v. Macfarland.* 59

See DEEDS; FRAUDS.

GARNISHMENT.

That a foreign attachment issued out of a court of another State, and the garnishee under its judgment has actually paid the money to an attaching creditor, does not discharge the garnishee, if it appear that the court has no jurisdiction over the subject matter, and that the garnishee might under the law of such State, have protected himself, but neglected to do so. In such a case, article 4, section 1 of the Federal Constitution, providing that full faith and credit shall be given in each State to the judicial proceedings of every other State, is not applicable. *Noble et al. v. The Thompson Oil Co.* 121

GIFTS.

A deposit of moneys in a savings bank in the joint names of husband and wife is not such a gift as will entitle the wife to hold the same on the husband's death, without proof of further delivery. *Matter of accounting of Ward, exr.* 503

In the absence of such proof the moneys belong to the estate of the deceased. *Ib.*

As to what will constitute a *donatio causa mortis*, see EXECUTORS AND ADMINISTRATORS.

GRAND LARCENY.

To constitute larceny there must be a felonious taking and carrying away of another's property. *Abrams v. The People.* 14

Such taking involves trespass, or fraud, or device in getting possession. *Ib.*

Possession of property fraudulently obtained with felonious intent, title remaining in owner, is larceny. *Kelly v. The People.* 15

Both possession and title so obtained, is "obtaining money under false pretenses." *Ib.*

If a person is overpaid by mistake, and at the time of discovering the error, whether that be at the moment of payment, or afterwards, forms the intention of defrauding the rightful owner as to such overpayment, it is larceny. *Wolfstein v. The People.* 184

GUARANTY.

A guaranty that certain county warrants are "genuine and regularly issued," means that they are valid, legal claims against the county. *Smeltzer v. White.* 106

Such a guaranty covers the defect in the warrants of the want of a proper seal, without which they would be invalid. *Ib.*

To recover upon a guaranty it is not necessary to return, or offer to return, the property purchased upon its faith. *Ib.*

GUARDIAN AND WARD.

The inadequacy of the security given by a guardian ad litem, and his compromise of suits without the knowledge of his ward, and without the sanction of the court, does not furnish sufficient cause for removing such guardian, without first affording him an opportunity to explain his conduct. *Ashley v. Sherman.* 294

As to effect of judgment entered without the appointment of a guardian ad litem, see JUDGMENT.

HIGHWAYS.

A person digging a pit or ditch near or in a highway, must see that travelers are protected from falling into it. *Beck v. Carlton et al.* 116

The same rule is applicable to any alley in a city, although the ditch or pit is not in the exact bounds of a street, alley, or lane. *Ib.*

The fact that a street is laid out with sidewalks, gutters, &c., and used by the public, is prima facie evidence that it is a street for public use &c. *Baxter v. Warner.* 266

No person, therefore, had a right to do anything himself, or to cause anything to be done by another, whether servant or contractor, which renders the street less safe than formerly. *Ib.*

One obstructing a highway cannot escape liability for the doing of such acts by proving that he made a contract with another to do them, and that they were actually done by the latter and not by himself. *Ib.*

Commissioners of High ways are not liable for damage caused by an erroneous construction of an embankment in a highway, by means of which the lands of abutting owners are deprived of drainage. *Gould et al v. Booth et al., Comrs.* 447

Private actions will not lie against them for errors in the exercise of their discretion, or omissions to perform their duty. *Ib.*

HUSBAND AND WIFE.

Where a husband and wife live apart under a deed of separation by which the wife is paid

a certain sum in lieu of support, in an action to recover for the wife's board evidence of cohabitation after the separation is competent to do away with the effect of the separation. In such case proof of cruel or inhuman treatment by the husband is not necessary. *Holt v. Desbrough.* 129

Where a physician is employed in attendance upon a sick person, his employment continues while the sickness lasts, and the relation of physician and patient continues unless it is put an end to by the assent of the parties, or the express dismissal of the physician. *Potter v. Virgil.* 243

A wife cannot abandon her husband's house and home and bind him for necessities, provisions, clothing, medical attendance &c., except on proof of gross abuse, neglect and misconduct on the part of the husband. *Ib.*

In the absence of the husband the wife may act as his agent and rent a house, and bind him for rent, &c. *Roberts v. Heap.* 292

IMPLIED OBLIGATION.

See CONSTITUTIONAL LAW.

INDICTMENTS.

As to organization of Grand jury, see JURIES.
As to practice on the trial of, see CRIMINAL PRACTICE.

As to the requisites and sufficiency of indictments for any particular offence, see the title of the crime in question, such as BIGAMY, GRAND LARCENY &c.

INJUNCTION.

A Court of Equity will not restrain proceedings at law upon a note which contains, as liquidated damages, a clause which provides that after maturity it shall bear interest in excess of the legal rate. *Downey v. Beach.* 72

An injunction will not be granted unless a reasonably clear case is made out. *Clark v. The N. Y. Life Ins. & Trust Co., et al.* 209

Neither illegality or irregularity in the proceedings, nor error, or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after its payment, will authorize an injunction restraining the collection of a tax. *Taylor, Collector, v. Secor et al.* 317

The rule as to courts of equity interfering with the collection of taxes stated and applied to a peculiar case. *Ib.*

INNKEEPERS.

In an action against an innkeeper for loss of a guest's property by fire, when the defense, under chapter 633 laws of 1866, was that the fire was of incendiary origin, and defendant's witnesses had given testimony tending to establish, and plaintiff's witnesses testimony tending

to rebut the defense, evidence that an attempt was made to fire an adjacent building on the same night is admissible. *Faucet v. Nichols*. 332

Negligence by an innkeeper in omitting precautions which a prudent man ought to take to protect the property of a guest, will deprive him of the benefit of the statute of 1866. *Ib.*

INSURANCE.

As to liability of insurance companies for acts of their agents, see PRINCIPAL AND AGENT.

As to waiver of conditions of policy by agents, see WAIVER.

As to principles governing different classes of insurance, see ACCIDENTAL INSURANCE; FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE.

INTEREST.

Compound interest is only recoverable on a special agreement to pay such interest upon interest after the latter has become due. *Young v. Hill*. 115

A final account made by a party, in which he includes interest on interest on his own bond, is such a special agreement as binds him to pay compound interest. *Ib.*

There being no agreement as to the rate of interest upon accrued interest, it will be computed at six per cent. (Ohio) *Cramer v. Lepper*. 587

INTEREST WARRANTS.

Interest warrants of a railroad company are not within the provisions of 1 R. S., 763, negotiable instruments as between third parties. *Evertsen v. National Bank of Newport*. 574

JUDGMENTS.

Clerical error in defendant's name in Sheriff's certificate of service, does not vitiate judgment afterwards obtained. *Müller et al v. Brenham et al.* 465

Action may be maintained in this State on judgment barred in State where recovered by lapse of time. *Ib.*

A judgment entered without having a guardian ad litem appointed for infant defendants is not absolutely void, but voidable. *McMurray et al v. McMurray*. 543

As to setting aside judgments, see APPEAL.
As to assignment of, see ASSIGNMENTS.

JURIES.

A challenge to the array of a grand jury on ground that it was not selected by the commissioners of jurors will not be allowed. *Carpenter v. The People*. 405

The acts of a de facto officer are valid as to the public and the validity of his title to office cannot be drawn in question collaterally. *Ib.*

As to manner of arriving at verdict, see PRACTICE.

JURISDICTION

A judgment recovered against co-partners in one State cannot be enforced in another against a partner not personally served with process and not residing in the State where the judgment was obtained, though his co-partner, after dissolution, may have authorized an appearance by attorney for the firm in the suit in which the judgment was recovered. *Hall et al v. Lanning et al.* 16

In an action on a foreign judgment, the record of which discloses an appearance, it is competent for the defendant to show the appearance was unauthorized. *Ib.*

After the dissolution of a co-partnership, one of the partners in a suit brought against the firm has no authority to enter an appearance for the other partners who do not reside in the State where the suit is brought and have not been served with process. *Ib.*

In an action for the recovery of property, it is not sufficient to give this court jurisdiction to review, on a writ of error, the decision of the highest court of a State, that title in a third party, acquired under a United States statute, is set up to defeat the plaintiff's claim; the defendant himself must claim title under a statute. (R. S., 709.) *Long et al v. Converse et al.* 33

The U. S. Supreme Court cannot re-examine the judgment or decree of a State Court simply because a Federal question was presented to that court for determination. It must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered. *Bolling v. Lersner*. 63

Due notice, actual or constructive, to the defendant, is essential to the jurisdiction of all courts. *Earle et al v. McVeigh*. 81

What is a good notice under a statute providing for constructive process, decided. *Ib.*

A claim by a trustee, that he was compelled to pay over the trust funds to the Confederate States, when the country was under military rule, is not a Federal question, and will not give this court jurisdiction to review a decision of the State court. *Rockhold v. Rockhold et al.* 82

A court will not be deprived of jurisdiction unless it appears affirmatively in the declaration that the "matter in demand" is beyond its jurisdiction. *Sullivan v. Vail*. 110

Before the jurisdiction of the Orphans Court has attached, a proceeding to declare void and alleged, release of dower is properly brought on the equity side of the Common Pleas. *Campbell et al v. Hammett*. 204

The Commissioners of Central Park had full jurisdiction to alter the grade of 123d St. between 6th and 7th Avenues. *The People ex rel. Kurzman v. Green et al.* 206

To give the United States Supreme Court jurisdiction to review the decision of a State Court, the judgment of the latter must be final. *Zeller et al v. Switzer*. 207

The Supreme Court has no jurisdiction to direct a receiver appointed under Section 50 of the National Currency act, who is not a party to the record, to pay over moneys in his hands to a judgment creditor of the bank over which he is appointed receiver. *Ocean National Bank v. Carl*. 812

Such receiver being under the control of the Controller of the Currency, such judgment creditor should present his claim to the Controller of the Currency for payment. *Ib*.

An unauthorized appearance by an attorney gives jurisdiction, and the subsequent proceedings in the action cannot be attacked in a collateral proceeding, on the ground that such appearance was unauthorized or forged. *Ferguson v. Crawford et al*. 386

A petition of administrators to the Surrogate for authority to sell real estate to pay debts, which omits "to state a description of all the real estate of deceased, whether occupied or not, and if occupied, the names of the occupants," will not confer jurisdiction on the Surrogate to grant the order to show cause. *Estate of Kelly*. 569

If the requirement of the statute which prescribes what such petition must state, may be disregarded in one particular, it may be in all. *Ib*.

Sections 1, 2 and 3 of Chap. 82, Laws of 1850, and the amendments of Sec. 3 by Chap. 260, Laws of 1869, and Chap. 92, Laws of 1872, do not cure or obviate such omission. *Ib*.

Said Sections 1, 2 and 3 are not applicable to proceedings before the Surrogate, and do not relieve him from requiring strict conformity to the requirements of the Revised Statutes governing such proceedings. To hold otherwise would nullify Sec. 4 of same act. That section prohibits the Surrogate from confirming a sale "unless upon due examination he shall be satisfied that the provisions of the title of the Revised Statutes (governing such proceedings) have been complied with, as if this act had not been passed." *Ib*.

The United States courts have exclusive jurisdiction of an action for the infringement of a patent. *De Witt v. Elmira Nobles Mfg. Co*. 589

State courts have jurisdiction in actions in which patent rights come in question collaterally. *Ib*.

As to effect of filing of petition in involuntary bankruptcy on jurisdiction of state court over pending cause, see BANKRUPTCY.

As to presumption in favor of, see FOREIGN JUDGMENT.

JUSTICES COURTS.

An answer alleging that a note was of no legal force, held a sufficient allegation to justify the defendant in insisting upon his right to amend by pleading the statute of limitations. *Leonard v. Forster* 508

As to justice's return, see PRACTICE.

JUSTIFICATION.

As to where sureties on an undertaking to discharge an attachment may justify, see ATTACHMENT.

LACHES.

Long delay in making application for leave to amend answer for the purpose of setting up the Statute of Limitations, is good ground for denying such application, especially where plaintiff's rights against other parties have been lost on account of the failure of defendants to set up said defence in the first instance. *Chase v. Lord et al*. 73

When more than three years have elapsed since the commencement of a suit, judgment by default will not be granted without notice to defendant. *Phipps v. Cresson*. 120

As to laches in presentation of checks for collection, see BANK CHECKS.

As to laches in applying for writ of certiorari, see CERTIORARI.

As to effect of laches in not bringing action to trial, see PLEADINGS.

LANDLORD AND TENANT.

When one of joint lessees receives rents under the authority created by a lease, and upon the strength of the title of the lessees, he has no right to retain the money on the ground that the lease was a nullity. *Dayton, public Admr. v. Mc Cahill et al*. 84

Lessee is bound to make ordinary repairs. Statute of 1869 (Conn.) applies only to cases where the building becomes untenable by reason of some sudden and unexpected calamity. *Hatch et al. v. Stamper*. 42

An action may be maintained in their individual names by a church committee. *Stott et al v. Rutherford*. 64

A lessee cannot dispute his lessor's title. *Ib*.

Acceptance of new tenants operates as a surrender of a lease. *Fobes v. Lewis*. 65

Where a lessee agrees to and does make repairs, under an agreement with the lessor that his lease shall be renewed and the amount expended in repairs shall be applied to the rents, and the demised premises are destroyed before the commencement of the new term and before the new lease is delivered, he may recover the amount so expended in repairs. *Smith v. Farnsworth*. 65

A board of Supervisors have no power to enter into a lease of a building for armory and drill purposes, until they have complied with all the requirements of section 120 of the Military Code of 1870. *Ford v. The Mayor &c. of N. Y*. 191

The Military Code of 1862, is repealed by the Military Code of 1870, except as to certain legal proceedings. *Ib*.

In Pennsylvania a tenancy at will is construed to be a tenancy from year to year. *Hey v. McGrath*. 250

Where the sub-tenant purchases the title of the paramount landlord, he is invested with all the latter's rights, including the power to determine the original lease. *Ib.*

The provision of law that an agreement not to be performed within one year is void, does not apply to contracts for leasing lands. *Reeder et al. v. Sayre*. 253

Parol lease, how it affects tenant from year to year. *Ib.*

Tenant holding over; tenant sowed crop under an agreement; the landlord afterwards sold; tenant may reap. *Ib.*

Equity will relieve a lessee against forfeiture for breach of a covenant to repair when the landlord has by his conduct misled the lessee into supposing that the covenant would not be insisted on. *Hughes v. Metropolitan R. Co.* 406

A parol lease vests in the lessee a present interest in the premises from the time the lease is made. It is not an executory contract. *Becar v. Fleres, exr., &c.* 421

Fraud in executing lease will vitiate it although party injured had friends present who could read and who could examine lease. *Edick v. Dake*. 559

As to damages for breach of covenants of lease, see DAMAGES.

As to evidence in actions on lease, see EVIDENCE.

As to ejectment for non-payment of rent, see EJECTMENT.

As to leases by married women, see MARRIED WOMEN.

As to release of sureties on lease, see PRINCIPAL AND SURETY.

LEGACIES.

See WILLS.

LETTERS OF ADMINISTRATION.

See EVIDENCE.

LIENS.

As to lien of mortgagor under a mortgage on the income and earnings of a railroad, see EXECUTION.

LIFE INSURANCE.

A wife insured the life of her husband, the amount payable to herself if living, if not, to their children. She died before her husband, and one of the children before him, leaving a child.

Held, That a transmissible interest vested in the children upon the issuing of the policy, and that the child of the deceased child took by descent the interest of its parent, and was entitled to the portion of the fund which the parent would have received if living. *Continental Life Ins. Co. v. Palmer et al.* 00

A life insurance policy, containing a clause providing it shall be void if the answers made to questions by the insured in his application are found to be false in any respect, is wholly avoided by a false answer whether it be material or not. *The Etna Life Ins. Co. v. France*. 83

In such case neither the court nor the jury can inquire into the materiality of either the question or answer. *Ib.*

A Court of Equity will reinstate the holder of a life insurance policy which has been forfeited by reason of non-payment of premiums, where payment of such premiums was impossible. *Bird v. Penn. Mutual Life Ins. Co.* 83

It is not necessary that an applicant for life insurance should sign the application personally; he may authorize any other person to sign for him. *Stelwagen v. The Merchants Life Ins. Co.* 125

Not stating in the application that the assured had applied to another company for insurance does not vitiate the policy. *Ib.*

A renewal of a life insurance policy, which had been forfeited by non-payment of premiums, procured by fraud, is void, and an offer of judgment for the amount of the money received as premiums at the time of renewal, with interest and costs, after suit brought, is a sufficient tender to allow the company to disaffirm. *Harris v. The Equitable Life Ass. Soc. of U. S.* 156

Statements in the application for insurance in the declaration, or answers to the questions are either warranties or representations. If warranties, then materiality, or want of materiality as to the risk, has nothing to do with the contract. The only question is, were they untrue, and if so, the policy is void. But if representations, then to avoid the policy, they must be substantially and materially untrue, or made for the purpose of fraud. *Buell v. The Conn. Mutual Life Ins. Co.* 161

Whether or not a disease is "serious" within the meaning of a life insurance policy is a question of fact for the jury. *Boos v. The World Mutual Ins. Co.* 211

An agreement to issue a policy of life insurance is good, although the premium was paid by note, and the note was not paid at maturity, where the policy contains no condition avoiding policy unless the note is paid. *Shaw v. The Republic Life Ins. Co.* 213

Where the administrator of the deceased had received the policy, but it was not in reality delivered by the agent until after the death of the assured, and in ignorance of that event, no recovery can be had unless a valid contract of insurance existed between the insurer and the in-

sured before the latter's death, and the policy delivered in pursuance thereof. *The Piedmont & Arlington Life Ins. Co. v. Ewing, Admr.* 276

A life policy containing a clause making it void if the insured went south of certain limits without the consent of the company, is invalidated by the continued stay of the insured south of such limits, whither he went under consent of the company for a prescribed period. *Evans v. The U. S. Life Ins. Co.* 284

And where the company's officers, after such forfeiture, declined to receive further premiums unless 2 1-2 per cent. more was paid to cover the additional risk, and gave plaintiff's agent till next day to pay, agreeing to keep the policy in force and give credit for the premium and percentage, they have the right to abandon their agreement, and to refuse to receive the premium and percentage, and declare the policy forfeited. *Ib.*

That the insured was ill, and that it was highly inconvenient for him to return, affords no ground for relief, unless it appear that he was actually unable to travel, even by short stages and at great expense. *Ib.*

A false answer in an application for life insurance avoids the policy, whether the insurer knew its falsity or not, if the answer is a material one. *Baker v. The Home Life Ins. Co.* 366

If a true answer is given by the applicant to the company's agent who reduced the answer to writing, and in so doing modified or varied its meaning, the company is estopped from challenging its correctness. *Ib.*

Authority to an agent to solicit applications for life insurance does not give him authority to collect premiums. *Howell v. Charter Oak Life Ins. Co.* 383

The principal has a reasonable time to repudiate the acts of an unauthorized agent, even if the death of the insured intervenes; and he need not tender back the premium received by such an agent. If he notify the agent of his dissent to his acts he need not notify the insured. *Ib.*

Where a bond is given by an agent, as a condition of his being retained as such agent, conditioned that he will pay over all moneys belonging to the company which he may receive, the sureties on such bond are not exonerated by the fact that the agent made a further agreement at the same time, as required by the company, that all his commissions thereafter earned should be applied to his past indebtedness to the company, of which they were ignorant. *Magee et al. v. The Manhattan Life Ins. Co.* 418

The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. *Ib.*

The prompt payment of premiums, or of interest annually in advance on a premium note, where the policy by its terms requires such payments, is a condition precedent to a recovery on the policy. *Anderson et al. v. The St. Louis Mut. Life Ins. Co.* 458

Dividends may be first credited on the principal

of outstanding notes, where such an agreement has been made or custom established between the parties by the course of business. *Ib.*

Equity cannot relieve against the forfeiture of a policy on account of non-payment of premiums or of interest on premium notes at the time required by the terms of the policy. *Ib.*

As to evidence in life insurance cases, see EVIDENCE.

LIS PENDENS.

A notice of Lis Pendens may properly be filed in an action to have a debt declared a lien upon the separate real estate of a married woman. *Sanders v. Warner.* 507

MALICIOUS PROSECUTION.

As to evidence in actions for, see EVIDENCE.

MANDAMUS.

When a party has a legal remedy, by action, against a town, a mandamus will not lie. *Marsh v. Town of Little Valley.* 48

What was once a claim against the County of New York, having become a liability of the city, the latter may be sued upon it and a mandamus will not lie. *The People ex rel. Tenth National Bank v. Board of Apportionment.* 54

A peremptory writ of mandamus, under Chap. 697, Laws of 1867, to compel Board of Assessors of New York City to assess damage to property, caused by closing street, is proper upon their refusal to act. *The People ex rel. Carleton v. Board of Assessors of New York City.* 118

A presumptive right to the writ is all that is necessary to be shown to secure success of applicant in such case. *Ib.*

See also, QUO WARRANTO.

MARINE INSURANCE.

Where a policy of marine insurance, by its terms, provides that the risk is to terminate at the place and at the time the voyage shall be stopped, in consequence of ice or the closing of navigation making a completion of the voyage impossible, and allows three days for a discharge of the cargo, the insured has the right to make every effort to continue the voyage, after stoppage, to a proper place to discharge the cargo and lay up the boat for the winter, notwithstanding it is apparent it could not be finished by reason of obstruction by ice. *Sherwood et al., exrs. v. Merchants Mutual Ins. Co.* 496

MARRIAGE.

As to effect of condition in restraint of, see WILL.

MARRIED WOMEN.

For goods purchased by a feme sole, she may be sued after marriage without joining her husband. *Helles et al. v. Rossele.* 85

A married woman, living apart from her husband and having a separate property of her own, may be made liable for domestic work done for herself and children. *Conlin v. Cantrell*. 128

The rule may now be considered settled wherever the chancery jurisdiction exists, that a married woman is to be regarded as a femme sole in respect to her separate property; and that she may dispose of it as she pleases, unless her power of disposition is restricted or limited by the deed or will creating her interest. *Smith v. Thompson et al.* 141

Where the beneficiary in a trust deed is a married woman, and there is no restriction upon the mode in which she shall alienate the property, only that the trustee shall join in the deed, this limitation has no reference to a devise, and her testamentary capacity in regard to said property is complete. *Ib.*

By virtue of the act of Congress regulating the rights of property of married women, passed April 10, 1869, a married woman may dispose of her entire property, constituting her separate estate, whether such property was acquired before or after the passage of the act. *Ib.*

A married woman may deal through her husband as her agent, *Crawford v. Everson et al.* 168

A married woman is incapable of making a contract except in regard to her separate property, but in reference to that she is treated as a femme sole; and if she gives a note, the law implies, in the absence of proof to the contrary, that she intends to bind her separate estate; but the intention must be manifested from the contract itself and cannot be shown by parol testimony. *The Metropolitan Bank v. Taylor et al.* 218

In order to operate as a charge upon her separate estate, when the engagement of a *femme covert* is made upon a consideration in which she or her estate has no direct interest, the intention to charge must be expressed in the contract which is the foundation of the charge. *Gosman et al. v. Cruger et al.* 329

A married woman who signs a lease not for the benefit of her separate estate or business, and not containing a clause expressly charging her separate estate, incurs no liability. *Eaustepere v. Ketchum et al.* 377

Her contracts not for the benefit of her separate estate are void. *Ib.*

As to when property of a married woman is liable for debts of her husband, see *Muirhead v. Aldridge*. 480

As to charging separate estate, see NEGOTIABLE PAPER.

As to release of dower, see DOWER.

MASTER AND SERVANT.

A master is not liable to his servant for the negligence of a fellow servant who has not been negligently appointed. *Malone, adm'x., v. Hathaway, survivor* 85

Where a master has left the control of his business to an employee, reserving to himself no discretion, he is liable for the neglect or omission of duty of the one thus representing him. *Ib.*

When an employee under a contract for payment of money by installments for a term of service is discharged without cause, he can only recover for the amount that would have been due, had he continued in service, at the time the suit was instituted. *Hamlin v. Race*. 117

If, when discharged, he rescinds the contract, and then sues for its breach, it may be that he can recover for all the damages he sustained during the term by the breach, if the trial was had after the expiration of the term. *Ib.*

There is no implied liability on the part of an employer to care for an employee injured in his service. *Rostern v. Dodd*. 239

A willful act which will exempt a master from liability for the tort of his servant, is in its legal sense malicious also. *Rounds v. The D. L. & W. R. R. Co.* 260

The master is not liable for the willful and malicious act of the servant. *Ib.*

It is in general sufficient to make the master liable that he gave his servant authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. *Ib.*

The relation of master and servant exists between the proprietor of a theatre and a star performer, and the former is liable for the negligence of the latter, whereby a spectator is injured. *Fox v. Dougherty*. 261

Where the person who was the immediate cause of an accident is a contractor engaged in performing a special work, the relation of master and servant does not exist, and the party employing him is not liable, unless the work contracted for is unlawful, or where an officer or public body charged with a certain duty commits its performance to another. *King v. The N. Y. C. & H. R. R. Co.* 460

MECHANICS LIEN.

Whether bringing materials upon the premises, and building a fence around the lot would be sufficient to establish a lien, *quære*. *Middle-town Savings Bank v. Fellowes*. 19

The work done having far exceeded the price agreed upon at the time of the taking of a mortgage, whether, if the builder's lien had had precedence, it could have covered more than work agreed upon, *quære*. *Ib.*

A party furnishing a contractor materials, &c., is not bound to notify owner of property in order to get and enforce his lien. *Wheeler v. Schofield*. 35

Where building was to be completed in one year, party may extend time verbally and lien will hold. *Ib.*

When the owner of land permits the construction of a building on his land occupied by another, and for another's benefit, the statute permits a lien by a mechanic or person furnishing material. *Nellis v. Bellinger*. 213

Property held by the public for specific public uses, is held in trust for government purposes, and cannot be taken by an individual for the satisfaction of his private claim. *Leonard v. Reynolds et al.* 327

Under a mechanic's lien the owner is not obliged to pay any greater sum than he agreed to pay the contractor nor more than was unpaid at the time of filing the lien. Before foreclosure the claimant should be able to show the inability of the owner to perform his promise or put him in default by demanding performance. *Miner v. Langan*. 482

A cancellation of the contract by mutual consent by the parties to it cannot affect the rights of a third party to enforce his lien for materials furnished the contractor. *Jenks et al v. Brown imple.* 487

Where a mechanic's lien has attached, it cannot be affected by any arrangement thereafter entered into between the contractor and the owner of the building. *Ib.*

MERGER.

Merger will depend upon the intention of the parties. *Beach et al, trustees, v. Allen*. 463

MISTAKE.

An act done or a contract made under a mutual mistake or ignorance of a material fact, is voidable and relievable in equity. *In the matter of the application of Mary E. Jackson, an infant, for leave to sell her real estate*. 17

Where in exchange of real estate on the basis of an appraised amount per foot, there is a mutual mistake in the amount conveyed by one to the other, the injured party is entitled to recover at the appraised rate for the deficiency. *Church v. Steels*. 52

The same can be recovered in an action of assumpsit for lands sold. *Ib.*

As to correction of mistake in conveyance, see DEEDS.

MORTGAGE.

A mortgage given upon the acquisition of title has precedence of a mechanic's lien acquired by reason of labor on, and materials furnished to the premises under a contract with the mortgagor, who at the time the labor and materials were furnished had a contract for, but no title to, the premises. *Middletown Savings Bank v. Fellowes*. 19

In Pennsylvania an equitable mortgage cannot be created by a deposit of title deeds, but a Court of Equity will not enforce their return until the party depositing them has complied with the agreement under which they are held. *Sidney v. Stevenson* 29

Order releasing defendant, bidding at foreclosure sale, of his bid, and directing referee to pay from the ten per cent. deposit expenses of sale, fees and expenses of re-sale having been entered, defendant is entitled only to the balance of deposit after paying referee's fees and expenses of first sale, attorney's costs and expenses of re-sale. *Knight v. Maloney*. 40

Where a will divides the whole of testator's property into certain portions, but was not properly executed as a will of real estate, and the heirs at law recover the realty, they must resort in the first instance to that to pay a mortgage upon it, but any deficiency will be paid from the personalty. *Rice, admr., v Harbeson et al.* 49

An actual, visible and open possession of the premises by the owner of an unrecorded title, is necessary to avoid the lien of a subsequent mortgage executed by the owner of record; an equivocal, occasional, special or temporary possession will not take the case out of the operation of the registry laws. *Brown v. Volkening et al.* 86

Where a valid, subsisting mortgage has been formally satisfied and discharged, and the amount thereof included in a new mortgage which embraces other amounts, and the latter mortgage is declared invalid as being usurious, the former mortgage revives. *Paterson v. Bird-sall et al.* 222

And the mortgagee in the second having paid off the first, upon having his mortgage declared void for usury, is entitled to subrogation to the rights of the first mortgagee. *Ib.*

In order to avail himself of usury in a mortgage, a party other than the mortgagor must assert an interest in the mortgaged premises. *Hubbell v. Mansfield*. 256

Where the defendant after commencement of the action pays a mortgage but not the costs, and sets up such payment by answer, it cannot be stricken out as sham. *Wetmore v. Gale et al.* 408

Costs in such an action are discretionary, and it is not certain that the plaintiff would be allowed costs. *Ib.*

An agreement made prior to the bond in suit, although it refers to it, cannot control it. *Smith v. Smith*. 422

A junior mortgagee may redeem from a prior mortgage by paying the amount due thereon and the costs. *Dings v. Parshall*. 459

The tender of the amount due thereon by junior mortgagees for purposes of redemption is equivalent, if properly made, to the payment of the money, provided the money tendered is set apart and kept for such mortgagee. *Ib.*

The junior incumbrancer having paid the debt is entitled to subrogation. *Ib.*

A bona fide endorsee of a note acquires the same right in a mortgage given to secure it as the original payee would have had if no equities had existed against the note. *Logan v. Smith et al.* 509

Where the mortgagor sells portions of the mortgaged premises, they will, on foreclosure, be sold in the order of their alienation. Grantees will be protected only to the amount of purchase money paid by them. In such a case the release of one lot does not necessarily discharge the others. *McDonald v. Whitney.* 529

Where a life estate is left to a widow, with remainder to infants, she stands in a position of trust towards such infants. And where she sells a portion of the property (under a power in the will) for a very low price, and did not apply the proceeds on a mortgage on the property, but allowed it to be foreclosed, the decree of foreclosure is ineffectual to bar the equity of the infant remaindermen, who were defrauded thereby, and they can maintain an original action in equity to avoid it. *McMurray et al. v. McMurray.* 543

The purchaser, the mortgagee, having taken it with full knowledge of all the facts, becomes merely a mortgagee in possession, and is bound to account to the infant remaindermen for their share of what he realizes over and above the mortgage. *Ib.*

A re-sale of premises under a decree of foreclosure will be directed upon equitable terms when the first sale is made in such manner as to prevent a fair competition, or where for any cause it would be inequitable to permit the sale to stand. *Phillips et al. v. Cudlipp, impl'd* 547

As to what is not a mortgage, see **CONDITIONAL SALES.**

As to effect of sale in partition upon mortgage given by one co-tenant, see **PARTITION.**

As to mortgage on income and earnings of railroad, see **EXECUTION.**

As to priority of simultaneous purchase money mortgages, see **PRIORITY.**

MUNICIPAL CORPORATIONS.

Board of revision and correct on have power to allow, and award damages to property owners, for damages done their property by changes in the grade. *The People ex rel, Tyler v. Green et al.* 126

The legislature of a State has authority to make a division of a municipal corporation, and upon such terms and under such regulations as it deems proper. *Board of Co. Com'rs of Laramie Co. v. Board of Com'rs of Albany Co. et al.* 194

Accordingly where a legislature divided one county into three without providing for the payment of the debts of the old county, the presumption is that the old corporation is responsible for all the debts contracted before the separation, and a bill in equity, on its behalf against the new to compel contributions for their proportion toward such indebtedness, cannot be maintained. *Ib.*

A municipal corporation is liable for injuries arising from the negligent construction of a work by one of its subordinate departments, although it may not have the power to appoint,

remove, or control the officers constituting such department. *Barnes v. The District of Columbia.* 201

The authorized body of a municipal corporation may bind it by an ordinance or resolution, which, in favor of private persons interested therein, may, if so intended, operate as a contract. *Town of Moultrie v. The Rockingham Ten Cents Savings Bank.* 271

The power to enact and enforce ordinances has always formed an essential feature in the creation of municipal corporations. The legislature may confer the power upon the Common Council, or any of the departments of the municipal government. *Cox v. The People.* 283

Section 104, of chap. 187, of the laws of 1870, with reference to founding contracts on sealed bids, considered and applied to a peculiar case. *Leverich v. The Mayor, &c., of N. Y.* 328

A substantial compliance with the 53d section of the charter of New York City, requiring heads of departments to certify to the necessity of the work, is sufficient to enable a party to recover a just claim against the city, even though there has not been a strict and formal compliance with the statute. *Ib.*

The Board of County Canvassers of New York City are organized as a distinct board for special service, and not as town officers, and have the right to designate the papers in which their proceedings shall be published. *Harkens v. The Mayor, &c., of N. Y.* 345

The provisions of the Revised Statutes relating to publications by County Canvassers (1 R. S., 138), is not in conflict with Chapter 875, Laws of 1869. *Ib.*

A board authorized by law to make contracts by publishing for proposals, and by giving the contract to the lowest bidder, has no authority, after the bids have been opened, to materially alter the contract as advertised by adding a clause thereto, and then award the contract to one of the original bidders, without a new advertisement. *Dickinson et al. v. The City of Poughkeepsie.* 349

Village trustees have no power to contract debts for entertaining editors visiting the village. *Gamble v. Village of Watkins.* 361

A municipal corporation does not insure citizens against damage from works of its construction, but is only liable for negligence or willful misconduct. *Smith v. The Mayor, &c., of N. Y.* 471

As to when municipal corporation is estopped from denying the validity of town bonds, see **ESTOPPEL.**

MURDER.

As to evidence on trial for, see **EVIDENCE.**

NATIONAL BANKS.

A national bank may sue a citizen of the district in which it is located, upon a promissory

note endorsed by such citizen, in the United States Courts for that district. *The Commercial Bank of Cleveland v. Simmons et al.* 97

Under sec. 5198 of the U. S. R. S. relating to penalties against national banks for receiving a greater rate of interest than is allowed by law, no recovery can be had beyond twice the sum of the interest paid in excess of the legal rate. *Hinaermister v. The First National Bank of Chittenango.* 173

The restriction in section 57 of Act of Congress of 1864, as amended by section 2, chapter 269 of laws of Congress, 1873 (8d session), as to issuing attachment, execution or injunction, before final judgment against national banks, does not relate to such banks as are located in other States than that in which the suit is brought, but to those that are within such State. *Southwick v. First National Bank of Memphis.* 216

In the absence of action on the part of the Controller of the Currency, the courts have power to appoint a receiver of a national bank upon application by a judgment creditor, subject, possibly, to his being superseded by the action of the Controller. *Wright v. Merchants' National Bank.* 539

When the general banking law does not provide for action by the Controller, a judgment creditor is entitled to the aid of a court of equity. *Ib.*

NE EXEAT.

See PRACTICE.

NEGLIGENCE.

An agister of cattle is liable for damages done through his negligence by a vicious animal in his care, to another animal also in his care, although he may not have known the vicious disposition of the former. *Smith v. Cook* 73

The question of contributory negligence is one for the jury. *Hill adm'r v. The N. Y. C. & H. R. R.R. Co.* 94

It is negligence in a passenger to alight from a railway carriage while the train is in motion; and it makes no difference that the passenger had arrived at her destination and the train did not stop long enough for her to alight in safety. *Burrows v. The Erie R.R. Co.* 106

Contributory negligence cannot be charged against a child of tender years, where its parents exercise such care in respect to it as persons of ordinary prudence would exercise under the circumstances, and where it exercises such care as might reasonably be expected from one of its age. *Fallon v. Central Park, N. & E. R.R. Co.* 112

It is no defence for a person against whom negligence which caused damage is proved, to show that without fault on his part the same damage would have resulted from the negligent act of another. *Slater et al. v. Mersereau.* 130

It is not *prima facie* negligence in a mortgagee or his conveyancer, to allow the proposed mort-

gagor to procure the necessary mortgage search. *Houseman v. The Girard Mutual Bldg. and Loan Ass.* 188

In an action against a railroad for negligently firing plaintiff's woodland, whether or not the injury was the direct natural consequence of defendant's negligence, is a question for the jury. *Pennsylvania R.R. Co. v. Hope.* 208

If passenger is directed to front platform with his baggage by conductor, and remains there, believing himself to be so ordered by conductor, and is there injured, he is not chargeable with contributory negligence. *Mack v. Dry Dock & East N. Y. R.R. Co.* 251

And that is so, though there is room inside, and a notice posted conspicuously forbidding riding on front platform. *Ib.*

Where a person approaches a railroad crossing it is his duty, before crossing to take the precaution to look both ways to see and ascertain whether or not a train is approaching, and his failure to do so is negligence. *Stockus v. The N. Y. C. & H. R. R.R. Co.* 401

The owner of an implement or piece of machinery may lawfully allow another to take and use it, and if in using it becomes defective and causes injury to a third person, the owner is not liable. *King v. The N. Y. C. & H. R. R. R. Co.* 460

Where a person is killed while walking over a railroad crossing in the daytime, there being nothing to obstruct the view of the track, and it does not appear that there was anything to distract her attention, *Held*, that she was guilty of contributory negligence. *Mitchel and'r v. The N. Y. C. & H. R. R. R. Co.* 586

The same degree of care is not required of one driving a team across a railroad crossing as of one crossing on foot. *Ib.*

As to exemplary damages in case of, see DAMAGES.

See also PRACTICE; NEGOTIABLE PAPER.

NEGOTIABLE PAPER.

Negotiable paper issued in such condition as to be easily susceptible of alteration amounting to a forgery, will be enforced in the hands of a *bona fide* holder. *Brown v. Reed.* 35

But where an instrument not purporting to be negotiable paper, but capable of being readily altered, without detection into such, is signed, whether or not the party signing was guilty of negligence, is a question of fact for the jury. *Ib.*

A party taking a note as collateral security for a precedent debt, without making any advances or giving any new credit thereon, is not a *bona fide* holder. *First National Bank of Clarion v. Gregg.* 66

A general promise for a valuable consideration to pay all the debts of another, if it inures to the benefit of the promisee's creditors, applies only to those who were such at the time the promise was made, and any one thereafter taking the promisee's outstanding note by endorsement from a then creditor, takes it subject to all equi

ties between the endorser and promisor, even though it may be taken for value before maturity. *Barlow et al. v. Myers.* 87

Where a bank holding negotiable paper receives the money on it, on the day of its maturity, from a party to it who takes it up without informing the bank of his purpose, and transfers it to a third party, the latter takes it subject to all equities existing between the maker and the party taking it up. *Lancey v. Clark.* 146

If the maker of a negotiable promissory note is induced to sign it by fraud, yet in so signing acts negligently, he is liable thereon to a *bona fide* holder for value. *Citizens' National Bank v. Smith.* 147

A receipt given on the deposit of moneys, agreeing to pay the depositor or order in paper currency the amount deposited upon the return of the receipt, is a negotiable promissory note. *Frank v. Wesels.* 163

In an action brought thereon the defendant, under the 2 R. S., 406, is entitled to a bond of indemnity where the instrument has been lost. *Ib.*

Payments of negotiable paper before it is due, and in the absence of such paper, are not made in due course of business, and the party so paying should be held to do so at his own risk. Therefore, the maker of negotiable paper is not discharged, if before the maturity of the paper, and after its transfer, even as collateral security, he makes payment to any person other than the real holder. *Gosling v. Griffin.* 190

It is not competent for the maker of a promissory note to set up, as a defence to a suit by an endorsee for value after maturity, any equities existing between the maker and an intermediate endorsee, not connected with the transaction between the original parties. *Young et al. v. Shriner.* 210

The *bona fide* holder of negotiable paper can recover without regard to any fraud in its inception. *Roberts v. Lane.* 223

One who puts in suit a note shown to have been obtained from the maker by fraud, assumes the burden of establishing his own good faith. It is immaterial what the plaintiff's knowledge may be, if any prior owner whose right he has was a *bona fide* holder of the note. *Ib.*

It does not affect the principles of law above stated, that the note was made to the maker's order and bore only his endorsement, if it is shown that in fact it was purchased by the plaintiff's predecessor in title, in good faith and for value, of him to whom the maker first gave it. *Ib.*

Where an agent acts in making or endorsing negotiable instruments within the scope of his general authority, the fact that he has abused or perverted it in the particular instance, constitutes no particular defense against a *bona fide* holder for value. *White's Bank of Buffalo v. Gets.* 267

An endorser will become liable upon his en-

dorsement to the payee of the paper, when he has made himself such for the purpose of securing the credit for the makers. *Weid et al. v. Bowns.* 286

The payee upon a note may show by parol evidence that the party endorsing commercial paper as its second endorser, had really bound himself and designed to become the first endorser. *Ib.*

Persons endorsing commercial paper should be held liable to those appearing to be prior parties upon it, when they are shown to have agreed to assume that relation, and the agreement was made upon a sufficient consideration. *Ib.*

Where an accommodation note is given and used as a collateral, and has not been diverted, the person holding it as collateral may recover against the makers. *Grocers' Bank v. Fenfield et al.* 344

An agreement to extend time on the original debt may be presumed from circumstances. *Ib.*

An endorser's promise to pay, after maturity of the paper, to be binding must be made with a full knowledge of all the facts. *Richard et al. v.oller* 353

A check for twenty dollars, drawn on the First National Bank of Houston, was fraudulently altered and raised by the payee to two thousand dollars. It was purchased of him by J. & Co., who endorsed it to their agents, the City Bank of Houston, who presented it to the First National Bank, and it was by said bank pronounced good. In the usual course of business it was taken up by the First National Bank in the exchange of checks after bank hours. The City Bank thereupon gave J. & Co. credit for the amount. The forgery was not discovered until the next month, on the balancing of the accounts between the banks.

Held, That the National Bank was entitled to recover the amount from the City Bank as money paid under a mistake of fact. *City Bank of Houston v. First National Bank.* 379

Where a bank certifies a check without filling all blanks, and by such omission the check is raised, it is liable in an action to recover the value of such raised check. *Helvess v. Hibernia National Bank.* 417

The certificate of a bank is equivalent to an acceptance. *Ib.*

The giving of a promissory note by one person to another is presumptively a settlement of all demands between the parties. *Sherman admr. v. McIntyre.* 486

This presumption may be repelled by evidence. *Ib.*

An endorsee of a note, who takes it as collateral security for a debt, created at the time, with no notice of any equities between the origi-

nal parties, and relying on the note for security, is a *bona fide* holder for value. *Logan v. Smith et al.* 509

The time when a note should have its inception is a question of fact for the jury under all the facts. *Sweet v. Chapman.* 513

In an action on a note given by an intestate just before his death, mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defence to the note. *Earl v. Peck, admr.* 527

A party to a note may annex to such note any condition as to its delivery he may deem proper. *Lattimer et al. v. Hill et al.* 566

Insertion in note of married woman, after its execution, of words making it binding on her separate estate, if authorized by her is valid. *Todicker v. Cantrell.* 572

As to manner of protesting negotiable paper, see PROTEST.

As to evidence in actions on negotiable paper, see EVIDENCE.

NEW TRIAL.

If the charge of a judge is erroneous, it is the duty of the court to grant a new trial, although neither the evidence nor the charge was excepted to. *Lattimer et al. v. Hill et al.* 566

For other cases in which a new trial may be granted, see PRACTICE.

NONSUIT.

See PRACTICE.

NUISANCE.

Burning brick with anthracite coal for a fuel is a nuisance. *Campbell et al. v. Seaman.* 41

OFFICIAL CERTIFICATE.

The Recorder of Deeds is liable in damages for losses suffered by a mortgagee by reason of a false certificate of mortgage search issued from the recorder's office. *Houseman v. The Girard Mutual Bldg. and Loan Ass.* 188

PARENT AND CHILD.

To entitle a daughter to recover of her father for wages for her labor and services, the contract to pay her must be clearly proved. *Sullivan v. Sullivan.* 111

PARTIES.

In the action against a firm of which one of the partners is dead, the administratrix of the deceased partner is a proper party defendant. *Haenes et al. v. Hollister, admrx., &c., et al.* 20

So also is the assignee of the firm where an accounting is prayed for. *Ib.*

In a certiorari where the collection of a tax in the hands of the City Treasurer is stayed, the Treasurer is a proper party. So also, all the assessors of the city. *The People ex rel. Utica & Black R. R. Co. v. Shields et al.* 157

Only those persons can be sued on an indenture, who are named as parties thereto. *Briggs et al. v. Partridge et al.* 371

A plaintiff has a sufficient interest to sustain an action upon several promissory notes endorsed to him for the purpose of collection, such endorsements being made upon the understanding that plaintiff would collect the notes if possible, and then account to the respective endorsers for the proceeds of the notes over and above their respective shares of plaintiff's expenses, and the expenses of collection. *Devol v. Barnes.* 384

The Board of Health is the successor of the City Inspector, and as such has control of all existing contracts made by him. *Bell v. The Mayor, &c., of New York.* 511

By section 5, act of 1874, the Board is made a necessary party in any action where any of its proceedings are called in question. *Ib.*

PARTITION.

A sale in partition discharges a mortgage made by one of the co-tenants upon his interest. The act of March 20, 1867, does not prevent this. *Wright v. Vickers, admr.* 222

An estate in fee, not subject to any life estate, though subject to the possession of trustees for the purpose of executing certain trusts, is a sufficient possession to uphold an action for partition. *Chapman et al. v. Covenhoven impld.* 365

A receiver appointed under supplementary proceedings may maintain an action for the partition of real estate in which the judgment debtor is interested as a tenant in common. *Powelson, recr. v. Reese et al.* 875

But the action being an equitable one, the court will order its discontinuance upon the payment of the judgment under which the receiver was appointed, together with his costs, fees and expenses as receiver. *Ib.*

It is not admissible in an action of partition to try the legal title, but equitable claims may be determined in such actions. *Knapp v. Hungerford et al.* 490

PARTNERSHIP.

A partner is not liable for goods ordered by his copartners, on his individual account, where the goods, by mistake, were delivered to the firm, if immediate notice is given the vendor. *Story v. Evans.* 89

Where one of several partners withdraws from the firm, under an agreement that the remaining partners and another shall pay all the debts, the retiring partner becomes, as between himself and former partners, a surety. *Moess v. Gleason et al.* 151

And where he procures a past due outstanding note of the old firm to be transferred to one of his former partners, who transfers it to a third party, he is not liable thereon until the holder exhausts all his remedies against the partnership assets. *Ib.*

Where, upon the formation of a copartnership, it is agreed that the new concern shall take the assets of one of the partners and pay all his specified debts, such promise inures to the benefit of the creditors of him whose assets were so taken. *Arnold et al, exrs. v. Nichols, imple, &c.* 174

And so long as the incoming partner retains the assets, he cannot defend upon the ground he was fraudulently induced to make the agreement. *Ib.*

One partner has no right, unless specifically authorized, to retain an attorney to appear in an action for his copartners in a suit brought against all the copartners. *Lyles et al v. Haggy et al.* 287

Where partners have settled and liquidated their accounts, Courts of Equity will not open them except upon clearly proved allegations of fraud or mistake. *Augsbury v. Flower.* 359

A partner to whom the partnership is indebted can have no satisfaction except out of what remains after the partnership debts are paid. *Estate of Gordon.* 438

Where firm holds all earnings in common, it is enough interested in a contract of third party with a member of said firm, to bring an action in the firm name to enforce said contract. *Tracy et al v. Watson.* 524

Partnership debts must be first paid out of partnership property, and when creditors obtain judgment against one member of a firm, and judgment is rendered against the creditor in favor of other members of the firm on ground of infancy, such creditor is still entitled to be paid out of partnership property. *Whittemore v. Elliott et al.* 535

Where one party advances money to another to be used in business under an agreement that they are to share equally in the profits and losses, they are partners as to third persons. *Mason v. Partridge, imple.* 576

Where there are limitations upon the authority of the active partner to bind the other by debts contracted by him, and the limitations have been disregarded with knowledge of such other, they furnish no defense, even as to those who knew of them. *Ib.*

As to power of one member of a firm to bind his copartners by submission to arbitration, see ARBITRATION.

As to power of one partner, after the dissolution of copartnership, to enter an appearance for other nonresident partners who were not personally served, see JURISDICTION.

PATENTS.

The decision of the Commissioner of Patents as to the extent of the utility or importance of an improvement is not conclusive. *Reckendorfer v. Faber.* 577

A combination, to be patentable, must produce a different force or effect, or result in the

combined forces or processes, from that given by their separate parts. There must be a new result produced by their union. *Ib.*

Where a license has been given by one or more of several owners in common of letters patent, the remedy of the others is by action for an account for whatever has been received. *De Witt v. Elmira Nobles Mfg. Co.* 589

As to sale of void patent, see CONSIDERATION.

As to jurisdiction of State and Federal Courts in actions on patents, see JURISDICTION.

PAYMENT.

A voluntary payment cannot be recovered. Fear of the result of an arbitration is not duress, and cannot affect the fact of its being made voluntarily. *Quincey v. White.* 37

Whether a payment is voluntary or not is a question of law. *Scholey, exr. v. Mumford, exr.* 294

Where illegal fees are demanded and paid as a condition of giving up certain property, such payment is not voluntary. *Ib.*

In the absence of appropriation by the parties, the law applies payments first to the interest, and then to the principal of the debt. *Moore v. Kiff et al.* 307

Where a debt is payable in a commodity, a failure to make or offer such payment fixes a liability to pay in money. *Ib.*

A party who pays money in his hands to A., who claims the same, after notice by B. that such money is the property of B., does so at his peril. *Phillips v. Pace.* 350

Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, payments made from time to time by the surviving partners must be applied to the old debt. *Hooper et al v. Keay et al.* 407

The pecuniary ability of the defendant does not raise a presumption of payment. *Alexander, exr. v. Dutcher.* 415

A general deposit of money in a bank will not operate as payment of a note held by the bank, and which has been protested, without specific instructions that it be so applied. *National Bank of Newburgh v. Smith.* 436

A negotiable note given for assessment on a premium note is payment of the same, if so intended by the parties at the time, and the agent in taking it binds the company by his act. *Lycoming Mutual Fire Ins. Co. v. Bedford.* 444

PERJURY.

An extra-judicial oath is no ground for indictment for perjury. *Van Dusen v. The People.* 90

The Fire Marshal of the City of New York has power to administer an oath upon an in-

quity into the cause or circumstances of a fire, without first having a complaint under oath made before him. *Harris v. The People.* 108

On the trial of an indictment for perjury, which charged the prisoner with having sworn falsely that he had lost 60,000 cigars by the fire, and the proof showed that he swore to having lost 65,000, the variance is immaterial, and it cannot be raised on appeal. *Ib.*

PERSONAL PROPERTY.

Where a conflict arises between the laws of two States as to the distribution of personal property, the law of the State where the property is situated must control. *Rice, exr., &c., v. Harbeson et al.* 49

The judgment of another State affecting the distribution of the personal property of a deceased citizen of this State, is of no effect as against the decree of a court of this State. *Ib.*

As to effect of attaching to real estate, see **FIXTURES.**

PLEADINGS.

A complaint uniting in one statement two causes of action, growing out of same act, but against different parties, not demurrable. *Arrell v. Ossusky et al.* 9

A demurrer on the ground of a defect of parties will lie only where the defect is apparent; otherwise the objection must be taken by answer. *Haines et al. v. Hollister, admrx. &c., et al.* 20

An amendment changing a cause of action upon certain notes to an action to recover certain loans for which the notes were given, cannot be regarded as the substitution of a new cause of action. *Rocky Mountain National Bank v. Bliss.* 39

No reply is necessary where the answer sets up merely that plaintiff is not the real party in interest. *Johnson v. White.* 90

Denial of knowledge or information sufficient to form a belief, in answering affidavit, is insufficient to put in issue positive allegations in the affidavit of applicant for writ of mandamus. *The People ex rel. Carlton v. Board of Assessors.* 118

In a suit against the maker of a promissory note, it is not sufficient to allege that plaintiff had "settled with" the payee, without alleging payment. *Bank v. Berger.* 274

In an action for damages for fraud committed by means of representations, falsely stating the state of defendant's knowledge, it should be so alleged specifically in the complaint to raise such an issue on the trial. *Marshall v. Fowler et al.* 274

In an action against a stockholder to recover the amount of a judgment against an insolvent corporation, on ground of failure to pay in his stock, and because no certificate of the payment of capital stock had been filed, a cause of action, seeking to recover against defendant as a trustee

of the corporation for neglect to make and publish the report required by law, cannot be joined. *Wiles et al. v. Suydam.* 281

The fact that the allegations as to both grounds were mingled in one count, does not deprive defendant of the right to demur. *Ib.*

Where defendant believes in good faith that he is concluded from pleading a certain defense, and therefore omits it in his answer, but afterwards and before trial learns that the disability as to the particular defense is removed, he should be allowed to amend his answer, and to set up this defense. *Seaver, collector. v. The Mayor, &c., of N. Y.* 340

In such a case defendant should pay all costs incurred from the time of service of his original answer. *Ib.*

In an action arising out of an alleged breach of covenant of seizin in a summons for money demand under subdivision 1 sec. 129 of the code, is not proper; it should be under subdivision 2. *Strong v. Dana.* 423

An allegation in the answer that the right of action is in a receiver named, and not in plaintiff, is a proper defence, and not demurrable. Under this defendant may prove appointment of receiver, and all facts necessary to establish his title. *Townsend v. Norris.* 433

General averments of time refer to the commencement of the action. *Ib.*

The court has authority to appoint a trustee of real estate in place of a deceased trustee, and an allegation that he was duly appointed by an order of the court is sufficient. *Hoff, trustee, v. Pentz.* 489

An amendment to a complaint striking out a waiver of a tort will not be allowed. *Cushman v. Jewell.* 567

Where plaintiff delays for several years after issue joined, in bringing his cause to trial, such delay will not prevent defendant amending his answer. *Bradley v. Sheehy.* 589

As to setting aside answer in foreclosure as sham, see **MORTGAGE.**

As to pleadings in actions by executors, see **EXECUTORS AND ADMINISTRATORS.**

As to pleadings in actions for fraud, see **FRAUDS.**

As to amendments of pleadings, see **PRACTICE.**

As to pleadings in actions where a receiver is a party, see **RECEIVERS.**

For rules of pleading in various special proceedings, see their titles, such as **BANKRUPTCY, &c.**

POSSESSION.

See **TITLE.**

PRACTICE.

Motion in arrest of judgment should be made on supposed defects in the record and not on mere defects of evidence. *Jacobowski v. The People*. 10

Remedy for defective proof is by way of objection and exception. *Ib.*

Improper entry of an order should be corrected by a motion to resettle the order. *Knight v. Maloney*. 40

An order made upon unfounded allegations of fact, which, had they been true, would have sustained it, is not improvidently granted. *Schlumpf v. Downes et al.* 41

A refusal to strike out evidence received under objection constitutes no ground for an exception; if for any reason it should not be considered, the remedy is to ask for instructions that it be disregarded. *Marks v. King*. 79

Where upon the return of an order to show cause why a mandamus should not issue, affidavits are presented on behalf of the defendant, upon which the relator takes no issue, but proceeds to argument, he admits the truth of the defendant's averments. *The People ex rel. Tenth National Bank v. Board of Apportionment of N. Y.* 84

Courts should not set aside a verdict of a jury except upon clear and palpable evidence of fraud, bias, or prejudice. *Hill admr. v. The N. Y. C. & H. R. R. Co.* 94

When the plaintiff has knowledge of the transaction in controversy, which is the subject of the action, and is not called as a witness, it is not error in the judge to submit to the jury the plaintiff's absence for them to consider, and it is not error for the judge to instruct them that if they find such absence to be of a suspicious character, that it would throw suspicion upon plaintiff's case. *Brooks v. Steen, imp'd., &c.* 96

Under Sec. 891 of the Code, the plaintiff may examine the defendant before issue joined, and before the service of the complaint. *Glennay v. Stedwell et al.* 97

Supreme Court rule 21, if intended to affect this right, is inoperative. *Ib.*

If the affidavit upon which the application is based gives the judge power to act, his action is discretionary, and cannot be reviewed by the Court of Appeals. *Ib.*

When more than three years have elapsed since the commencement of a suit, judgment by default will not be granted without notice to defendant. *Phipps v. Cresson*. 120

The court may correct an erroneous sentence any time during the term and before the sheriff has proceeded to execute sentence. *In the matter of Swan*. 114

It is too late to raise an objection to the complaint for the first time on appeal. *Holt v. Desbrough*. 129

A return of a justice is held conclusive as to facts therein stated. *People ex rel Simmonds v. Ryker*. 140

A justice is liable for a false return. *Ib.*

A reference cannot be ordered to take proof of the facts stated in a return. *Ib.*

A note given to obtain the signature of a creditor to a composition deed, the amount of which is in excess of the amount paid other creditors, is void. *Slade, survivor, v. Wilson*. 148

When a defendant, setting up such a defense, fails to establish it but is allowed, without objection, to prove, uncontradicted another, viz.: want of consideration, it is error to refuse to direct a verdict for the defendant. *Ib.*

The court can only order the exceptions taken in a case to be heard in the first instance at the General Term. *Benedict v. Phelps*. 150

Whether or not an accident by which plaintiff was injured could have been avoided by proper care and diligence is a question for the jury. *Haycraft v. L. S. & M. S. R. R. Co.* 155

The Special Term has no power to order a motion for a new trial, upon exceptions, to be heard in the first instance at the General Term, after having entertained a motion for a new trial, upon the judge's minutes; and it makes no difference that the latter motion was based upon questions of fact; the code allows no separation of the application. *The People v. Tweed et al.* 159

Upon a motion for a stay of proceedings, without security, pending an appeal, the court should be possessed of all the facts and circumstances relating to the appellant's means and property; in considering such an application, the recovery had is presumed to be correct, and the possession thereof ought not to be jeopardized by tying appellee's hands. *Ib.*

The difficulty of the legal questions involved, the length of the trial, the labor of preparing for trial, the amount of the verdict, the number of motions made in the course of the proceedings, are considered in determining whether a case is "difficult or extraordinary" for the purpose of fixing an allowance. *Ib.*

It is well settled that the court cannot set aside a judgment to enable a party to appeal when the time to appeal has expired. There is no power in the court directly or indirectly to extend the time of appeal. *Whitney et al v. Townsend*. 173

The court is justified in regarding technical irregularities in the entry of judgment as waived by lapse of time, when there is nothing in the papers to show that the advantages gained by the respondent by reason of gross laches of the appellants is inconsistent with equity and justice. *Ib.*

The court has power in its discretion to allow the discontinuance of an action without costs. *Hilborne, assignee, v. Kelle et al.* 183

It is error for the General Term on reversing a judgment, to direct judgment absolute unless it clearly appears that no evidence, upon a new trial, could change the result. *Graves v. Waterman, admr., et al.* 186

Circuit Courts are not required to hear oral testimony in equity cases, but if they do it must be reduced to writing and accompany the record, and must include testimony objected to and ruled out, subject to the objection. The U. S. Supreme Court will not send the case back to have the rejected testimony taken. *Blease v. Garlington.* 180

A party in whose behalf a witness is examined under the provisions of the Revised Statutes allowing the examination of witnesses for the purpose of perpetuating their testimony, cannot properly file the deposition until the examination of the witness is completed, although the Judge may have subscribed and certified it. *Ilwaco v. Wood et al.* 203

The Judge before whom the examination is had may limit the cross-examination in order to prevent its unnecessary continuance for the purpose of annoying the witness. *Ib.*

The General Term has no power to set aside a verdict as against the weight of evidence upon an appeal from the judgment only. A motion for that purpose can only be made at Special Term or Circuit, and must be brought up on an appeal from the order thereon. *Boos v. The World Mutual Ins. Co.* 211

Upon a proper showing the Court of Appeals will order its remittitur amended so as to state that the order of affirmance is without prejudice to an application by the appellant to the court below to reopen the case. *Petition of Ingraham.* 211

The Court of Appeals will not reverse a judgment upon a fact which the judge below expressly refused to find, and which was not conclusively proved. *The Standard Oil Co. v. The Triumph Ins. Co.* 235

In an action to recover unliquidated damages, the jury may resort to means to arrive at a verdict that are not allowed in actions where the damages are liquidated. *The St. Louis & South-western R. R. Co. v. Myrtle.* 254

To make the improper conduct of an attorney, in going outside the evidence and making improper comments, available as error, the court must be called upon and refuse to stop counsel. *Ib.*

Application may be made in ejectment suit by defeated party within three years after judgment entered to vacate judgment and for new trial. *Towle v. De Witt.* 264

Party having entered judgment in his own favor irregularly is not allowed to question its irregularity for the purpose of defeating a motion to vacate judgment and for new trial. *Ib.*

The U. S. Supreme Court, upon an appeal from a decree, cannot review a master's report

upon exceptions filed after the decree, nor set aside a decree because it was obtained by fraud. In such case the remedy is by bill of review. *Terry v. The Commercial Bank of Alabama.* 279

An affirmative defense, alleged upon information and belief, unsustained by proof, may be stricken out as sham. *Gaul v. The Knickerbocker Life Ins. Co.* 288

The forty-first rule of the courts of record of New York State does not entitle the party making a case, as a matter of absolute right, to the use of the stenographer's notes. *Bohnet v. Lathauer.* 290

Any other statement showing what the evidence was may be used instead of those notes. *Ib.*

The matter has been committed very much to the judgment and discretion of the justice before whom the trial may be had. *Ib.*

In order to take advantage of a refusal of the judge to submit a specific question of fact to a jury, there must be a specific exception to such refusal. *Moore et al v. Bristol et al.* 293

An exception generally to the direction of the court to the jury to find a verdict for the defendant, is not sufficient. *Ib.*

In application for inspection of papers, facts should be given which would enable the court to determine whether the evidence so sought is material. *Brooklyn Life Ins. Co. v. Pierce et al.* 296

The rule that if the charge does not mislead the jury, a new trial should not be ordered, applied to a peculiar case. *Sloane v. Elmore.* 304

Where a general exception is taken to the refusal of a judge to direct a verdict for defendants, no request being made that the justice submit to the jury any questions of fact, on appeal the party making the request is concluded by the finding of the justice from raising the point that specific questions of fact should have been submitted to the jury—the justice having thereafter directed a verdict for plaintiff. *Strong, recr., v. The N. Y. Laundry Mfg. Co.* 334

The defense of usury should be made out by a fair preponderance of evidence. *Ib.*

On a motion to set aside a judgment of divorce because of adultery, on the ground of fraud and collusion defendants affidavit is competent, though she might not testify as to her innocence on the trial. *Megarge v. Megarge.* 353

In such a case it is proper to apply by motion instead of by action. *Ib.*

The rule that an abuse of discretion is ground for reversal applied to a peculiar case. *Smith et al. v. Neals.* 375

The finding of a justice at Special Term of a fact entirely outside of the issues raised by the pleadings, is error sufficient to reverse the judgment, especially when such findings might have influenced such justice in his finding of a subsequent conclusion of law. *Dinkelspiel et al. v. Franklin et al.* 396

A verdict cannot be set aside as against evidence where the defendant has not moved for non-suit nor asked the court to direct a verdict in his favor. *Peake v. Bell*, 423

The practice with reference to the writ of ne exeat requires the special allowance of the writ by an order of this court, and there should be an endorsement upon the writ by the clerk, showing the amount in which the defendant should be held to bail. *Viadero v. Viadero*, 424

The liberal provisions of §§ 173, 174 of the Code, with reference to amendment, applies to the writ of ne exeat. *Ib.*

If upon a reference certain facts are not found, and no request made to find them, the appellate court cannot assume they existed, nor can it look into the evidence to ascertain whether facts were proved which if found would require the reversal of the judgment. *Brett v. First Universal Society*, 483

Where there is a plain conflict of evidence upon one of the issues raised by the pleadings, it is error to take the question from the jury. *Genet v. The Mayor &c. of N. Y.*, 437

Referee's findings on questions of fact are conclusive. *Meeker v. Guylord et al.*, 441

Although the complaint may not have covered case as proved, where the evidence is not objected to, the court on appeal will dispose of case as though the pleadings were amended on trial. *Tisdell v. Morgan*, 470

Where evidence is conflicting the court will not review a question of fact. *Berry v. Jackson*, 470

A non-suit should only be ordered where the evidence on either side is so clear and undisputed that a verdict in conflict with it could not be sustained. *Hodgkins v. Van Amber et al.*, 478

On a motion for a non-suit all disputed facts are to be decided in favor of plaintiff. *Ib.*

An order directing service of summons by publication against a non-resident corporation will be sustained under §135 of the Code, when the subject of the action is personal property, within the State, and the transactions in controversy took place here, and the cause of action arose here. *Matter of the application of the Atlantic Giant Powder Co., &c.*, 475

Where the judgment is entered upon the report of a referee and the General Term has a right to review the facts, it is its duty to pass upon them from the evidence. *Godfrey v. Moser*, 483

To order a non-suit on the opening of a case, the court must be satisfied that the counsel stated no cause of action in his opening, providing same was fully proved. *Shubert v. Shubert*, 484

It was a proper question for a jury whether the President and Secretary of a company, in purchasing goods, &c., acted individually or for the company. *Ingelhart et al. v. The Thousand Island Hotel Co.*, 492

The articles of incorporation of defendant are competent for the consideration of the jury. *Ib.*

In an action to recover damages for an injury sustained by falling on a sidewalk, the question whether the sidewalk was in an unsafe condition, and whether the injury was caused solely thereby, or whether negligence or want of care on the part of plaintiff contributed to it, should be submitted to the jury. *Clemence v. City of Auburn*, 497

Where a party has been nonsuited, he may insist, upon appeal, not only that the judge erred in his application of the law to the facts, but that he erred in his conclusions of fact, or that there were disputed questions of fact that should have been submitted to the jury. *Ib.*

It is proper for the court to direct a verdict whenever a verdict contrary to such directions would be set aside as being against evidence. *Parker v. McCunn, exr. et al.*, 502

A reargument will not be ordered to decide questions which may arise in other pending actions, when all the questions involved in the appeal have been passed upon on the former hearing. *Becker v. Howard et al.*, 508

The court is not in error in refusing to leave to the jury the question of the value of the services for which the note was given, where the same were to be determined by the intestate, as that would be, in effect, to deprive the intestate of his power of determination. *Earl v. Peck, admr.*, 527

For the reception of incompetent evidence which could not by any possibility harm any one, the court will not reverse a judgment. *Lyng v. Boyd*, 528

When a party requests certain specified questions, for which there is no valid ground, to be submitted to the jury, it is to be assumed that he intends to waive the submission of other questions. *Dounce v. Duns et al.*, 536

An exception to the decision of a judge denying a motion for a new trial on the minutes, on the ground that the verdict is against the weight of evidence, instead of its being on the ground of insufficiency of evidence to support it, is valid as to form, though the ground of the motion does not come within the express terms used in §264 of the Code. *Sharkey v. Torrilhon*, 538

After a jury has retired, the court, in absence of the counsel for either party, cannot instruct the jury on any point material to the issue. *Burke v. Webb*, 579

It is the province of the jury to reconcile the conflict of proof, and determine from all the evidence whether the truth is on the side of the complainant or of the defendant; and when this has been done, free from passion and prejudice, and the record contains evidence sufficient to sustain or justify the result, the verdict must be regarded as final. *Berdel v. Berdel*, 581

No appeal being taken from an order in be-

half of plaintiff amending the complaint upon the trial, the defendant being successful, it stands intact as a part of the case, with all the benefit to the plaintiff to be deprived therefrom. *Hauck v. Craighead et al., exrs., et al.* 594

Where there is a conflict in the evidence upon a material issue in the case, the court must submit the question to the jury. *Ib.*

What constitutes intoxication is a question of fact, to be determined by the jury upon the whole evidence, in the light of their own observation. *Roth v. Eppy.* 596

As to decisions on matters of practice, on topics which are treated under separate titles, see those titles.

PRINCIPAL AND AGENT.

A principal who ratifies the act of a voluntary agent who receives money for his principal and makes a loan in his behalf as a condition of such receipt, is entitled to receive the money so paid to the agent upon the repayment of the loan made by the agent. *Fowler et al. v. The New York Gold Exchange Bank.* 1

A voluntary agent is entitled to be reimbursed for expenses incurred in behalf of his principal, on the ratification by the principal of the agent's acts. *Ib.*

A principal can enforce all rights of action acquired on his behalf by his agent, irrespective of any obligations or liabilities arising in the transaction between the principal and agent. *Indianapolis, P. & O. R. R. Co. v. Tyng.* 80

A principal is bound by the knowledge of his agent only so far as it was gained in the transaction in which he was employed. *Houseman v. The Girard Mutual Bldg & Loan Ass.* 188

Where a contract is signed by "the cashier," and it is found that he so signed under the direction of the president of the bank, and his act purported to be on behalf of the bank, the bank is bound. *Merchants Bank v. The Meyers Steel & Co., Co.* 214

A party cannot avoid his agent's acts as to part of a transaction and avail himself of them as to the residue. *Ib.*

Commissioners appointed by and in pursuance of an act of the legislature for a particular purpose, viz.: to erect a court-house in one of the judicial districts in the city of New York, and having no corporate or continuous power, are agents of the city; and the city is liable for expenditures made by them in the prosecution of the work. *Wood et al. v. The Mayor, &c., of N. Y.* 220

The remedy in such case is by action, and not by mandamus. *Ib.*

Where an attorney is employed by a collection agency to collect a claim, the attorney is the agent of the collection agency, and not of the creditor. *Hoover, assignee v. Wise et al.* 241

A general agent having the custody and control of his principal's property with full power to preserve and dispose of it in the way he

deems most appropriate to the success of the business, has a sufficient interest to entitle him to insure the property. *Kline et al., ex'rs. v. Queen Ins. Co.* 343

And where such property has been insured as property held in trust by the person to whom the policy issued, such property will be regarded as coming within the terms of the policy. *Ib.*

The fact that an agent has authority to do a certain act, does not warrant an inference that he has general authority. Express authority should be shown. *Gillett v. Hall.* 448

A corporation is liable only for the actual damages caused by the willful acts of its agent, done in the course of his employment, unless it shall have authorized such acts or ratify them after they are done. The agent alone is liable for all exemplary damages arising out of such act. *McKinley v. Chicago & N. W. R. Co.* 453

A promissory note given for work done for the principal by an agent having a power of attorney, and signed "J. E., attorney for the estate of L. Hayes," does not bind the heirs of the estate, (the principals). *Merchants Bank v. Hayes et al.* 525

Where one employs a contractor to rebuild his house, under an agreement that the contractor shall make good any damage to a neighboring house, and the contractor uses insufficient means to support said house, whereby it was damaged, the employer is liable. *Bower v. Peate.* 530

It is the duty of a principal, when he terminates the agency, to notify all parties who have been in the habit of dealing with the agent. *Claffin et al. v. Lenheim.* 558

The fact that dealings between the parties had been suspended for two years, and that on resuming them the principal dealt directly with the parties, is not sufficient to constitute constructive notice of the revocation of the agency. *Ib.*

The immediate employer of the agent or servant who causes the injury is alone responsible for such injury; to him alone the rule of *respondeat superior* applies, and there cannot be two superiors severally responsible. *Wray v. Evans.* 561

Insurance companies doing business by agencies are responsible for the acts of an agent within the general scope of the business in his charge, and no limitation of his authority will be binding on parties with whom he deals which are not brought to his knowledge. *Merserau v. Phoenix Mutual Life Ins. Co.* 584

As to liability of principal who is unknown at time of making the contract, see CONTRACT.

As to right of agent of insurance company to waive conditions in policies, see WAIVER.

PRINCIPAL AND SURETY.

Mere indulgence to the principal will not work a discharge of the surety; to have such an effect the act must be legally injurious,

or inconsistent with the legal rights of the surety *Clark, admr. v. Sickler, admr.* 232

If the payee, where one party to a note signed as surety, takes a new note of the other makers, extending the time of payment, and procures the new note to be discounted, the surety on the first note is discharged; the raising of the money on the new note is a sufficient consideration. *Hubbard v. Gurney.* 335

Damages on breach of covenant in a lease cannot be taken advantage of by sureties, in an action on the lease, without showing the principal to be insolvent. *Morgan v. Smith et al.* 346

Where a surety is only induced to become such by an agreement of the landlord to do certain things, and where there is a conflict of evidence on such point, it should be submitted to the jury. *Ib.*

A bona fide purchaser without notice, of real estate, upon which there is lien by judgment, although not technically surety for the judgment debtor, occupies a similar position, and if the judgment is stayed by an undertaking on appeal, a release by the judgment creditor of the sureties on the undertaking on appeal, will operate to discharge the judgment lien upon the land, and support an action to restrain a sale thereof upon execution. *Barnes et al. v. Mott impld., &c.* 363

An intentional act which materially changes the contract without the surety's consent will discharge him, whether it was for his benefit or not, and even though he might have sustained only nominal damages. *Polak v. Everett.* 385

A surety is discharged by the creditor releasing a security in his hands for the principal debt, though it does not go to cover the whole of that debt, and the creditor allows the surety the whole value of the security. *Ib.*

In order to discharge a surety on a bond for the faithful performance of his duties and trusts by the principal, there must be proof that the delinquency of his principal was caused by dishonest conduct or a gross violation of the obligations imposed by the bond. *Atlantic and Pacific Tel. Co. v. Barnes et al.* 418

The discharge of a bankrupt judgment debtor from a judgment from which an appeal is pending, and before its affirmance upon such appeal, does not discharge the sureties upon the undertaking on appeal given to stay proceedings upon the judgment pending the appeal. *Knapp et al. v. Anderson et al.* 600

As to where sureties on undertaking may justify, see ATTACHMENTS.

As to estoppel of surety from claiming a discharge, see ESTOPPEL.

As to sureties on bond of insurance agent, see LIFE INSURANCE.

PRIORITY.

Where simultaneous purchase money mortgages are given, but recorded at different times,

an assignee of the first recorded mortgage, without notice of the mortgages being equal liens, acquires no priority over those subsequently recorded. *Green v. Deal.* 149

A judgment creditor, whose judgment was a lien against his debtor's real estate, prior to the latter's being declared an habitual drunkard cannot be postponed on a sale of the real estate in the payment of his claim till after the costs of the estate are paid. *Malone v. Clinton.* 158

PRIVILEGED COMMUNICATIONS.

See EVIDENCE.

PROTEST.

Looking in the directory merely for the address of an endorser is not making that diligent inquiry which the statute requires. *Greenwich Bank v. De Groot.* 256

PUBLIC ADMINISTRATOR.

The interest on money deposited by the public administrator in bank, subject to the joint order of himself and the Comptroller, and which is paid by the bank, belongs to the lawful owners of the fund, not to the City. *Sullivan, pub. admr. v. Henera et al.* 325

The law relieving the city from paying interest after the money is deposited in the City Treasury, after the public administrator has settled his account, does not change the rule. *Ib.*

PUBLIC OFFICERS.

The presumption is that a public officer performs his duty. This presumption may be overcome by evidence. *Burditt v. Barry.* 113

An officer to justify his acts must be an officer *de jure.* *Ib.*

Where the Commissioners of Public Works are authorized to contract for deepening a sewer, and after entering into a contract pursuant to such authority, for an open sewer, *Held*, that the Commissioners did not exceed their authority by entering into a subsequent contract with the same party to construct a tunnel sewer instead of an open one without readvertising for bids. *Lutes et al. v. Briggs et al.* 453

The Commissioners are not liable to parties who have paid the assessment for any surplus that may remain after the work is paid for; but the parties must look to the Common Council. *Ib.*

The discretion of heads of departments in the removal of subordinates by way of discipline, is limited to cases which are in violation of prescribed regulations. *People ex rel. McLaughlin v. Fire Department.* 514

As to appointment of public officers, see APPOINTMENT.

As to liability of Commissioners of Highways, see HIGHWAYS

QUO WARRANTO.

The question whether a territory claiming to be a school district, is a legally existing district, cannot be tried upon an information in the nature of a quo warranto against the person elected as a committee of the district. *State ex rel. Woodford v. North et al.* 90

The People having, through their constitutional agents, ratified an election at which a judicial officer is elected, it is not competent for them to question it by quo warranto. *People v. Flanagan.* 565

To remove a duly elected officer of a society, because of alleged ineligibility, the proper mode of proceeding is by quo warranto, and not by mandamus to compel a new election. *Mutter of Hebra Hased Va Emet.* 584

RAILROAD BONDS.

Railroad bonds payable to bearer, with place of payment left blank, and the amount of principal and interest secured thereby indefinite and uncertain, are not negotiable. *Jackson v. The V. S. & T. R. R. Co. et al.* 263

And where the President is authorized by endorsement to name the place of payment whereby the amount secured is made certain, and endorses the bonds but leaves the place of payment blank, an innocent holder acquiring possession from a thief is not authorized to fill the blank. *Ib.*

RAILROAD COMPANIES.

A railroad company must maintain fences along the line of its road, and at crossings, gates, &c. *Spinner v. N. Y. C. & H. R. R. R. Co.* 80

Failure to keep gates shut is evidence of negligence, and the company is liable for any damage occasioned thereby. *Ib.*

A passenger railway, which is required by its act of incorporation and by a city ordinance, to keep the streets, upon which its track is, in good repair, is bound to clear away debris, &c., carried on to the street by an unprejudiced freshet. *Pittsburg & Birmingham Pass. R. R. Co. v. City of Pittsburg.* 136

The ticket issued by a railroad company is not conclusive evidence of the right of the holder, but only a token or voucher, adopted for convenience, to show that the passenger has paid his fare from and to the point named. *Nelson v. The Long Island R. R.* 145

The representations of a ticket agent who receives the money and hands out the ticket, as to the time the ticket has to run, are admissible and binding on the company. *Ib.*

A passenger, having been ejected from a train for wrongfully refusing to pay his fare, has no right, upon an offer to pay his fare after such expulsion, to be again admitted as a passenger on the train. *Ib.*

A railroad company have a right to require

all persons to procure tickets before entering the cars. *The St. Louis & S. W. R. R. Co. v. Myrtle.* 254

Railroad companies are not liable for the loss of merchandize delivered to them as baggage for transportation with a passenger. *Sloan v. The G. W. R. R. Co.* 268

To make the company liable the passenger must in some way bring to the knowledge of the company the fact that the property checked is merchandize, not baggage. *Ib.*

In an action against a railroad company for killing an animal at a crossing, it is not sufficient to show that the employees of the company neglected to ring the bell or sound the whistle in order to authorize a verdict against the company, but it must also be shown that such negligence caused the damage. *Holman v. The C., R. I. & P. R. R. Co.* 474

A railroad company is bound to use more caution in crossing a street in a crowded city than in crossing a country road. *Zimmer v. The N. Y. C. & H. R. R. R. Co.* 531

Where a conductor attempts to eject a passenger from the train for refusing to pay his fare a second time, the passenger has a right to protect himself against any such attempt, and may resist to such extent as may be necessary to maintain such right. *English v. The Prest., &c., of the D. & H. C. Co.* 580

The train being in motion, the passenger is justified in repelling any attempt to eject him which would endanger his life or subject him to great hazard and peril, and his resistance cannot be urged against his right to recover damages for injuries sustained through such ejection. *Ib.*

A contract between a railroad company and an express company which provides that the railroad company should assume the usual risks upon express matter, except that it should not assume any risk or loss upon any money, &c., for which, with the express company's safes and messengers, no charge for carriage was to be made and the latter were to ride free, will not protect the railroad company from liability for negligence of its employees, by means of which one of the messengers is killed. Such protection can only be invoked where there is an express provision to that effect in the contract. *Blair, adm'r, v. The Erie R. Co.* 598

As to taxation of railroad companies, see TAXES.

RAISED CHECKS.

See NEGOTIABLE PAPER.

RECEIVER.

An action to recover an assessment on stock held by defendant may be maintained by the receiver of a national bank. *Stanton, rec'r, v. Wilkeson.* 91

The U. S. District Court has jurisdiction of such an action. *Ib.*

An order "to execute and acknowledge formal satisfaction and discharge of all real estate mortgages" held by a receiver, authorizes him to satisfy and discharge, upon payment, a mortgage not yet due. *Hurmans, trustee, v. Carlson*. 290

Where, on motion for a receiver, an order is made that a named person on giving security be appointed receiver, the appointment takes effect from the date of the order; and therefore where, after such an order, and before the receiver so appointed perfected his securities, certain execution creditors, who had received notice of the appointment, put the sheriff in possession of the goods over which the receiver was appointed, *Held*, That immediately on notice being given of the appointment the sheriff ought to have been withdrawn. *Edwards v. Edwards*. 814

Receiver permitted to come into an action and serve an answer setting up his appointment, and forbidden to allege anything in hostility to plaintiff, may not afterwards amend such answer and allege other matters. *Harlow, trustee, v. Southworth, receiver*. 522

The appointment of a receiver in proceedings for the voluntary dissolution of a corporation, of the property of the corporation, before the report of the referee appointed under the order, was irregular and in no way vested property in receiver or prevented creditors from pursuing their ordinary remedies. *Chamberlain v. Rochester Seamless Paper Vessel Co.* 588

While a court of equity will, on a proper application, protect its own receiver, when his possession is sought to be disturbed, and while a plaintiff desiring to prosecute a claim against the receiver might, very properly, obtain leave to prosecute, yet his failure to do so is no defense to his action on the trial thereof, and especially so where there is no attempt to interfere with the possession of the receiver, but only to obtain a judgment on a claim for damages. *Allen v. Central R. R. of Iowa*. 597

As to power of receiver in supplementary proceedings to bring action of partition, see PARTITION.

As to actions against receivers, see CONTEMPT.

As to appointment of receiver of national bank, see NATIONAL BANKS.

As to power of State court to direct receiver of national bank to pay over moneys, see JURISDICTION.

REFEREES.

The test by which to determine whether the referee should find the facts which he was called on to find is, are they material, or were they mere items of evidence not proper subjects for specific findings. *Steele et al. v. Lord*. 225

A referee has power to amend a complaint by striking out or inserting the name of a party upon such terms as he shall deem just. *Knapp v. Hungerford et al.* 491

There is a distinction between a reservation of a question as to the effect of evidence, and a reservation as to its admissibility. *Lathrop et al. v. Bramhall, admr., et al.* 545

Unless the party's rights or interests are injuriously affected by the referee's action in the former case, no rule of law is violated, and the referee has a right to use his discretion in reserving his decision. *Ib.*

Where a complaint and bill of particulars is served setting up certain items, a referee cannot render a judgment on another and different claim when the complaint is not amended or no notice given of any claim on such new item. *Hallenbake v. Phelps et al.* 587

REFERENCE.

The character of an action on contract to recover money deposited with a person on his promise to return same when demanded, is not changed by the allegation that the depository misappropriated and converted the funds. *Harden v. Corbett*. 21

The complaint is controlling in determining the nature of an action. *Ib.*

Where the accuracy of an account is brought in question the case is referable. *Cowden v. Teale*. 22

As to practice on a reference, see PRACTICE.

RELEASE.

An agreement not to sue one of several joint debtors, or one of several conspirators, does not release the others. *The People v. Tweed et al.* 181

RELIGIOUS SOCIETIES.

Under section 4 of the Act of 1818, providing for the incorporation of religious societies, it must appear that the property was given or granted to the society or for its use, or no title will vest: if, from the nature of the society's holding it is apparent that the owner of the fee did not so intend, no title passes. *The Alexander Presbyterian Church v. The Presbyterian Church, cor. 5th ave. and 19th-st.* 178

See CORPORATIONS.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

A suit commenced and actually tried in a State court, before the passage of the act of Congress of March 3, 1875, but in which a new trial had been granted, and which was pending after the passage of the said act, may be removed from such State Court to the Circuit Court of the United States. *Andrews, exr., v. Garrett et al.* 142

Under the act of 1866 (14 U. S., S. at Large 306) a cause cannot be removed from a State to the U. S. Court, where there is but a single defendant. *Voss v. Yulee*. 367

After trial, appeal and reversal, it is too late to remove under the act of 1789. *Ib.*

A party seeking to remove a cause must comply strictly with the statute. *Ib.*

The act of Congress only authorizes a removal where application therefor is made before final hearing or trial, and this means before final judgment in the court of original jurisdiction. *Bric. et al. v. Sommers et al.* 478

An application made after an appeal has been taken, is too late. *Ib.*

A suit to annul a will as a muniment of title, and to limit the operation of a decree admitting it to probate, in all its essential elements is a suit for equitable relief, and if it can be maintained in a State court, may also be maintained by original process in a Federal court, or removed thereto, where the parties are residents of different States. *Gaines v. Fuentes et al.* 554

REPLEVIN.

In an action to recover personal property, no demand is necessary of a defendant who wrongfully detains the property, not being a bona fide purchaser. *Salamon v. Van Praag.* 28

At common law and by statute of 1875, (Conn.) a right to immediate possession is necessary to maintain replevin for goods unlawfully detained. *Spencer v. Roberts.* 92

Under statute of 1866, title was sufficient. *Ib.*

A refusal based upon one ground to deliver personal property to one claiming it, is a waiver of all other objections to a delivery, which cannot afterwards be abandoned and others insisted upon. *Bradley v. Cole.* 93

No demand is necessary to maintain replevin where defendants' possession is illegal and wrongful. *Shoemaker et al. v. Simpson.* 93

The claim itself is consideration enough to support an undertaking upon claim and delivery of personal property. *Harrison, survivor, v. Utley et al.* 230

It is not necessary that the property should be taken and retaken in order to sustain an action on the bond, the taking and retaking may be claimed and bond given directly. *Ib.*

RESIDENCE.

As to place of business in New York City giving a residence in this State, see ATTACHMENTS.

REVIEW.

See PRACTICE.

REVIVOR.

A supplemental complaint may be filed to carry into effect a judgment of foreclosure upon application of the assignee or the representative of a deceased plaintiff. *Robinson v. Brisbane et al.* 171

A lapse of over four years from the date of the recovery of judgment, and nearly three years from the date of the assignment, does not

per se work a forfeiture of the right to be allowed to file supplemental bill, but is only a circumstance bearing on the good faith of the application. *Ib.*

Section 121 of the code includes not only legal representatives but successors in interest. *Ib.*

A proceeding by petition against a former trustee to open an order by which he was discharged as trustee under the statute, on the ground of gross mismanagement and violation of duty while acting as trustee, may be revived against his representatives in case of the death of such former trustee pending such proceedings. *In the matter of will of Foster.* 220

SAILING RIGHT.

The rule that the sale of an interest in a vessel by a part owner, who is also a master, carries no right to the command, is founded on the policy of the law, and a contract to sell the command, even by the owners of a majority interest, is incapable of enforcement. *Williams v. Ireland.* 281

Any contract that fetters the judgment of the owners, or binds them to the selection of a particular person, is in violation of the rights of the other parties, whose property or lives are involved in the voyage, and therefore void. *Ib.*

Where a master, who is also part owner, sells his share and transfers the command to his vender, the latter takes only an expectancy that he will be allowed by the owners to retain the command, and whatever he pays for this expectancy is a profit to the former master for his relinquishment of the command, and not any part of the ship's earnings, in which the other owners are entitled to share. *Ib.*

SALES.

An exact meeting of the minds of the parties with reference to all its terms and incidents is necessary to constitute a contract of sale. *Alexander et al v. Fowler.* 390

As to sales and re-sales on foreclosure, see MORTGAGE.

As to what is necessary to take a sale of personal property out of the statute, see STATUTE OF FRAUDS.

SALE OF INFANT'S LAND.

The findings of a referee in proceedings for the sale of an infant's land are representations to a purchaser upon which he may rely. *In the matter of the application of Jackson, an infant, for leave to sell her real estate.* 17

SEDUCTION.

A grandfather, who took his grandchild in her infancy, and adopted and supported her until she was fifteen, when she left his house, and supported herself, may maintain an action for her seduction. *Certwell v. Hoyt.* 177

SERVICE.

In summary proceedings to remove tenants, a service of the summons upon the tenants and undertenants by leaving a copy thereof at their

place of business with a person of mature age, and who at the time of the service was on and employed on the premises, is in sufficient. *People ex rel. Mordaunt v. Fowler, Justice.* 560

And where an objection to the regularity of the service is made preliminarily, which is overruled and exception taken, by subsequently offering evidence the tenants do not waive the defect in the service of the summons. *Ib.*

Neither a party nor a witness attending a court in this State from a foreign State can be served with a summons, unless he loses his privilege by remaining within the State an unreasonable length of time after the close of the trial. *Person v. Markle et al.* 567

SET OFF.

Judgments can only be set off on summary application by motion. *Swift v. Prouty.* 406

Where a party, as security for another, has deposited certain bonds in bank, and has given his note for an amount represented by some of those bonds, and by the order of the court some of those bonds are sold; in an action on the note by party for whose benefit the deposit was made, the amount of the bonds sold may be off set against the note. *Manning v. Sweeting.* 443

SHERIFF.

Sheriff has a right to pay money into court where there are contesting claimants to it. *Weld v. Conner, sheriff, et al.* 100

Court may direct him so to do. *Ib.*

As to right of holder of sheriff's certificate to surplus moneys on sale under deed of trust, see TRUST DEEDS.

SLANDER.

Words spoken, imputing unchastity to a female, are not actionable without special damage. *Pollard v. Lyon.* 440

The special damage should be alleged and proved specifically. (See, however, *Laws of N. Y.*, 1871, c. 219.) *Ib.*

SPECIFIC PERFORMANCE.

Where, under a parol contract for the purchase of land, the vendee has paid the consideration but received no deed, consent that the vendee may take possession of the land will be implied; it cannot be inferred that the vendor intends to retain the consideration and the use of the land. *Miller v. Ball.* 245

A parol agreement between an ancestor and a third person by which, for a consideration, the former agrees to sell and convey certain real estate to the latter, when performed, binds the heirs of the vendor. Admissions of ancestor are admissible to establish such agreement. *Knapp v. Hungerford et al.* 490

Third party can protect his interest in equity, and compel heirs to convey to him their interests. *Ib.*

The heirs could not be compelled to take the house so built under such agreement, and pay for same; they could be compelled to convey same to such third party. *Ib.*

STATE BONDS.

Where State bonds are required to be endorsed by the State, and the endorsement refers to the statute under which they were issued, and "that the undersigned governor * * has hereunto set his hand and caused to be affixed hereto the seal of the State," and the seal was affixed, the bonds are well executed by the governor signing his name without the addition of his official designation. *Levy et al v. Burgess.* 403

STATUTE OF FRAUDS.

To take a sale of personal property out of the statute there must be a payment or a delivery and acceptance of the article. Delivery without acceptance is not sufficient. *Brewster et al. v. Taylor.* 23

A sale of growing timber, to be taken away by the purchaser as soon as possible, is not a contract for or sale of land or any interest therein, within the 4th Section of the Statute of Frauds. *Marshall v. Green.* 43

Such a sale is within the 17th Section, and a portion of the trees having been cut, that was acceptance and actual receipt of a part of the goods sold, which made the oral contract of sale binding within the meaning of the Section. *Ib.*

A verbal promise by a vendee who takes land subject to encumbrances to pay such encumbrances is valid. *Taylor et al. v. Preston.* 68

The law raises an implied promise on the part of the vendee taking subject to encumbrances, when they enter into the consideration, to indemnify the vendors against them, and the vendor may sue to the use of the holder of the encumbrances without showing that he has paid it. *Ib.*

An agreement by which one creditor assumes the debt of another creditor and takes security from their debtor for his own debt and the one assumed, and the other creditor releases the debtor, is not within the statute of frauds. *Tisdell v. Morgan.* 470

An action may be sustained for the price of goods, value over \$50, where the sale was by parol, no money paid at the time of sale, and the delivery made some time subsequent to the sale. *Dellon et al. v. Stanton.* 488

STATUTE OF LIMITATIONS.

Under the bank charter which bound the individual property of the stockholders for the ultimate redemption of the bills issued, a right of action accrues to each bill-holder when the bank refuses to redeem, and is notoriously and continuously insolvent; it is not necessary to first exhaust the assets of the bank by legal proceedings. *Terry v. Tulman.* 244

In an action for work done, the plaintiff, in answer to a plea of the Statute of Limitations, put in evidence the two following letters, written within six years of the commencement of the action by the defendant's testator, the person for whom the work was done, to the plaintiff: "I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week."

Held, That they amounted to a promise to pay the balance due on the account, and took the case out of the statute *vincey v. Sharp et al.* 446

Where notes are transferred by indorsement in part payment of a debt, payment of the notes at maturity by the makers does not operate as an acknowledgment of the residue of the indebtedness; they not being the authorized agents of the debtor. *Smith survivor v. Ryan.* 590

There is no agency between several joint debtors or between principal and surety or an insolvent debtor and his assignees which will make apayment by one evidence of an acknowledgment of the debt by the others so as to revive it. *Ib.*

The delivery of notes in part payment operates only as of the day of delivery to take the case out of the statute. *Ib.*

As to limitation of time to contest discharge of bankrupt, see BANKRUPTCY.

STAY OF PROCEEDINGS.

See PRACTICE.

STOCKBROKERS

A person selling pledged stock "under the rule" may purchase it himself. *Quincey v. White.* 87

It is not *per se* unlawful as against public policy for several persons to unite in speculating in a particular stock. As to what kind of combination would be unlawful *Quære. Ib.*

In a purchase of stock by a broker, and a sale in default of margin, it is a question for the jury whether the broker was to borrow money on the stocks for the purpose of carrying the same. Also, what is proper notice of sale for default of margin. A regular sale, namely, a sale to be delivered the next day, not void under the Statute of Frauds. Broker need not keep the identical stock on hand if he had other shares of the same stock to supply their place. *Rogers v. Gould.* 69

STOPPAGE IN TRANSITU.

Delivery of goods by a vendor to a carrier is a delivery to the vendee. But until the transitus is completely ended, the vendor has a right to stop them in transitu, if the vendee become insolvent after the sale and before delivery. If the vendee was insolvent at the time of the u-

chase, whether it was known to the vendor or not, no right of stoppage exists. *Gallagher v. Whitaker.* 95

SUBROGATION.

One who holds under a grantee of a fraudulent conveyance is not entitled, on paying the amount of a judgment, to be subrogated to the rights of judgment creditor who has had such conveyance set aside. *Cole v. Malcolm, impled.* 454

One who, after foreclosure, purchases of the mortgagor a term of years, and agrees to pay incumbrances thereon, so far as may be necessary to protect his title, does not stand in the position of a surety, and is not entitled to be subrogated. *Bloomingtondale v. Barnard.* 455

The doctrine of subrogation is applicable where a party is compelled to pay the debt of another to protect his own rights or to save his own property. *Cole v. Malcolm, impled., &c.* 476

As to right of second mortgagee to be subrogated to right of first mortgagee, see MORTGAGE.

SUMMARY PROCEEDINGS.

As to service of summons in, see SERVICE.

SUPERVISORS.

Section 1, Chap. 855, of the laws of 1869 as amended by Chap. 260, laws of 1874, and Sec. 2. of the former as amended by the latter act, provides for two separate and distinct classes of cases. *The People ex rel. Atkinson et al., comrs. v. Tompkins, supervisor, &c.* 196

The provision of Sec. 1, that the officers must meet on the first Monday in September, is merely directory. *Ib.*

A Board of Supervisors are empowered to name the officer by whom town bonds, to raise money for road or bridge improvements, shall be executed. *Ib.*

As to whether Court Officers are entitled to extra compensation for the care of individual jurors by night and on days when the court is not holding, is for the Board of Supervisors to determine and not for the courts. *Cahill v. The Mayor, &c., of New York* 197

As to damages recoverable in actions against supervisors, see DAMAGES.

SUPPLEMENTARY PROCEEDINGS.

As to power of receiver to bring action for partition, see PARTITION.

As to proceedings for contempt in, see CONTEMPT.

See also GARNISHMENT.

TAXES.

A Court of Equity will not interfere by in-

junction with the collection of taxes. *Rowland et al. v. The First School District of Weston.* 46

Railroad companies are liable to be taxed for personal property at actual value of stock in same manner as other personal property. *The People ex rel. Utica & Black R. R. Co. v. Shields et al.* 157

Failure to furnish the assessors with the statement required by law, leaves it with the assessors to pass their judgment as to value of property upon same basis as upon individual property. *Ib.*

As to what will authorize an injunction to restrain the collection of a tax, see INJUNCTION.

TENDER.

In an action upon the second of two notes, given upon consideration of the assignment of a judgment by the party receiving the notes, such assignment to be made upon the payment of the notes, an offer to assign must be shown before a recovery can be had. *Berringer v. Wengeroth.* 47

The terms of a contract requiring the delivery of bonds signed by Smith, as Governor, are not met by a tender of bonds signed by Smith, although the latter bonds may be good. *Levy et al. v. Lurgess.* 403

TITLE.

A parol sale of land with possession under it for twenty years makes a good title. *Benedict v. Phelps.* 150

When lands are sold under a contract of sale without a conveyance thereof, the legal title remains in the vendor. *Smith v. Ferris.* 163

Possession by a vendee is equivalent to notice of a claim. *Chadwick v. Fanner.* 197

The Indian title to lands in this State extends only to the right of occupation, and when they abandon possession, the right of possession attaches itself to the fee without grant. *Howard et al. v. Moot.* 297

The court will take judicial notice of the extinguishment of the Indian title. *Ib.*

Where a party is in actual possession of property which he holds under a deed of trust, it is necessary to show fraud or mistake to impeach his title. *Hill v. Heermans.* 442

As to remedy where title fails, see EQUITY.

TOWN BONDS.

A town is obliged to provide for the payment of bonds issued by them. *Marsh v. Town of Little Valley.* 48

If a town fails to pay its bonds, an action will lie against it, and if judgment is obtained, the board of supervisors are to assess, levy, collect and pay the same as other contingent charges. *Ib.*

The repeal of the act under which town bonds have been issued, does not affect the bonds already issued, and the holders have a vested right to collect them that cannot be impaired. *Ib.*

In the absence of fraud or warranty, the vendor of negotiable town bonds, which, after the sale, are declared void by the courts, is not bound to repay to the vendee the purchase price. *Otis et al. Cullum recr., &c.* 58

An action will not lie to restrain the levying of a tax to pay railroad bonds which were illegally issued. *Comins et al. v. Board of Supervisors of Jefferson Co.* 104

Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal. *Town of Coloma v. Kaces.* 228

In a suit upon negotiable town bonds, the town is bound by the recitals in the bonds, and in its official records. *Town of Moultrie v. The Rockingham Ten Cents Savings Bank.* 271

Where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the bona fide holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. *Marcy v. Township of Oswego.* 393

Chap. 809 of laws of 1871 is constitutional. The legislature has power to pass an act ratifying bonds illegally issued. *Holton v. Town of Thompson.* 434

Where a petition of the tax-payers of a town, signed by a requisite number, is made to bond said town in aid of a railroad, the statute gives no right which the railroad company can enforce against the town, even where the Commissioners have entered into a contract pursuant to the provisions of the act of 1870. *Buffalo & James town R. R. Co. v. Weeks et al.* 457

Where a county judge has decided that town bonds shall be issued for railroad purposes, and appointed commissioners for that purpose, and a certiorari is granted to review his decision, and the commissioners afterwards issue the bonds

to the railroad company, both parties having knowledge of the certiorari, the railroad company acquires no title to the bonds which they can enforce against the town. *Bailey v. Town of Lansing.* 562

An innocent purchaser of such bonds would acquire the rights of a *bona fide* holder of commercial paper and could recover, but the burden of proof is upon him to show that he is a purchaser in good faith and for value; he cannot rely upon the presumption derived from his possession of the coupons before they became due. *Ib.*

As to when a municipal corporation is estopped from denying the validity of town bonds, see ESTOPPEL.

As to who shall appoint officer to issue the bonds, see SUPERVISORS.

TRESPASS.

When bonds are sold under a contract of sale without a conveyance thereof, the legal title remains in the vendor. *Smith v. Ferris.* 163

Damages for opening a highway through such land should be awarded to, and all releases should be made by the vendor. *Ib.*

A husband who, with his wife, resides in a house built by him, upon his wife's land, the house and land being under his control, may maintain trespass for breaking and entering the house. *Alexander v. Hard et al.* 170

Under such circumstances, the presumption is rather that the wife is residing in the house by reason of her marital relations, rather than that she claims control or possession. *Ib.*

A person has no right to place a family infected with small-pox in an unoccupied dwelling house belonging to another, without the consent of the owner, or authority from the board of health of the town, although such removal of the family may be necessary to prevent the spread of the disease. *Beckwith et al. v. Sturtevant.* 187

As to costs in cases of trespass, see COSTS.

TROVER.

As to measure of damage in actions of trover, see DAMAGES.

As to when action for trover will lie, see ACTION.

TRUST DEEDS.

The holder of a sheriff's certificate of sale under judgment, which had run only fourteen months, is not entitled to the surplus moneys arising on a sale under a trust deed, which had been recorded prior to the judgment. *Solt et al. v. Wingart.* 98

A trust-deed in and by which the grantor conveys all his real and personal property, in order to be relieved of the care of it, does not include family portrait. *Hill v. Heermans.* 304

Such a deed should be liberally construed. *Ib.*

See also MARRIED WOMEN.

TRUSTEES.

A trustee may purchase from the cestui que trust, under circumstances amounting to a fair and distinct dissolution of the trust at the time of the purchase. *Graves v. Waterman, admr.* 186

Under an agreement by which several lienors of land combined to perfect title in one who was to pay all the liens out of the future proceeds of said property, under which agreement title was perfected and rents collected, the one in whom the title became vested is bound to account, as trustee, for the rents so collected; the words "future proceeds" are sufficiently comprehensive to include rents and profits. *Belmont v. Poutvert.* 300

A trustee who has faithfully performed his duty as such cannot be removed on application of the cestui que trust. *Hull v. Mitchison.* 339

The period of the performance of his duty having passed, and there being no possibility of further performance, a trustee is bound to account for the trust estate, and is liable for any loss to it by his misfeasance or neglectful non-performance. *Heims v. Goodwill.* 357

In such case an action for an accounting will lie, although no damages or fraud is proven. *Ib.*

An assignment of all claims, demands and causes of action legal or equitable, passes to the assignee a right of action for an accounting against a trustee. *Ib.*

A discretion vested in trustees to advance certain moneys if they deemed it proper, is only exercised when the money is actually paid, and until then they may refuse the advancement, although they may have concluded at one time to pay it. *Roosevelt et al. v. Roosevelt et al.* 432

As to suits in equity to rescind agreement of trustees, see EQUITABLE ACTION.

TRUSTS.

Where a testatrix left property in trust to pay the income thereof to her son for life, directing "the same shall not in any way be liable for any past or future indebtedness of my said son," the income in the trustees' hands cannot be reached by an attachment execution. *Bachman v. Wolbert et al.* 278

Where money of one is already in the hands of another, the owner may create a trust with regard to such money without further delivery to the holder, provided the trust is sufficiently proved. *Lambert v. Freeman et al.* 421

The money received for real property, held in trust, remains impressed with the trust. *Hoff, trustee, v. Penta.* 439

Where a testator devises his property to his executors as trustees, directing them to divide it in seven equal parts, the income of one part to be paid over to each of his children during their lives, and on the death of any child, to convey his share to his issue, a valid several

trust is created for each of testator's children living at his death in one-seventh part of the estate, which ceases with the life of the *cestuis que trust*. *Bruner v. Meigs et al., trustees*. 553

Two of the children having died before the testator, their shares went to the heirs of testator and not to the executors in trust. The shares vested immediately in those entitled in remainder, and did not depend upon the power given the executors to transfer such shares, and the vesting could not be defeated or delayed by the neglect or omissions of those vested with the power. *Ib.*

UNDERTAKING.

As to consideration for undertaking in replevin, see REPLEVIN.

As to justification of sureties, see ATTACHMENTS.

USURY.

A bank is under no obligation to give an applicant for discount notice whether or not his paper will be taken. And it makes no difference that the discount was to be applied to the payment of notes then in the bank on which the applicant was an indorser. *The First National Bank of Lebanon v. Calk*. 23

The usurious interest taken by a national bank in previous transactions only will be a matter of set-off. *Ib.*

The whole interest paid can be recovered only in an action as a penalty of debt. *Ib.*

It is not usurious to insert in a note, as liquidated damages, that after maturity it shall bear interest in excess of the legal rate. *Downey v. Beach*. 72

It is not usury to insert in a promissory note that it shall draw interest, after maturity, at a rate in excess of that allowed by law. *Kilbreth, trustee, v. Wright*. 127

State banks, when usury is taken, only forfeit the excess of interest. *Bank of Monroe v. Finley*. 192

The defense of usury is only a partial one. *Ib.*

An usurious agreement to extend the payment of a debt does not vitiate the debt or its securities; the agreement alone is void. *Real Estate Trust Co. v. Keech*. 327

The amount paid as consideration for such an agreement should be applied as part payment on the original debt. *Ib.*

A promissory note, actually made and signed in the city of Washington, but dated at Leavenworth, in the State of Kansas, and sent the Second National Bank of Leavenworth, and by it discounted, is to be governed as respects a question of usury by the laws of Kansas. *The Second National Bank of Leavenworth v. Smoot et al.* 389

To take out interest in advance on discounting a note by a bank is not usurious. *Ib.*

A contract for a loan of money at a rate of interest which is legal in the place where the contract is made, though the money is to be repaid in a State where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the State where the money is to be repaid. *Ib.*

Where an agent, who is employed to effect a loan on bond and mortgage, retains a part of such loan, upon the pretense that a portion thereof is for his services and the balance a bonus for his principals, they not receiving any portion of the part so retained, the mortgage is not usurious. *Estevez et al. v. Purry et al.* 553

A party who purchases land subject to a mortgage which he is to pay as a part of the purchase price, is the purchaser of the equity of redemption merely, and cannot set up as a defense that the note secured by the mortgage was usurious. *Cramer v. Lepper*. 587

As to defense of usury in foreclosure, see MORTGAGE.

As to proof of usury, see PRACTICE.

VARIANCE.

Under an allegation of the recovery of a judgment in the Circuit Court for the District of Wisconsin, a judgment obtained in the Eastern District Court of Wisconsin is inadmissible, where the defendant has pleaded *nul tiel*. *Dow v. Humbert et al.* 185

VENDOR AND VENDEE.

Where the vendor of personal property, such as cigars, has done all in his power to complete its delivery to vendee, and thereafter exercises no control over and asserts no possession in the property, the vendee's title is perfect. *Straus et al. v. Minzesheimer, et.* 160

The relative rights of vendors and purchasers of cigars are not affected by the Act of Congress of July 20, 1868, requiring the boxing and stamping of cigars before sale, so as to invalidate, as between themselves, their contract of sale for a supposed violation of the act. *Ib.*

A sold note signed by the broker of both parties necessarily imports a purchase of the articles therein described, and binds the vendee as well as the vendor. *Buller v. Thomson et al.* 295

As to obligation of vendor of the good-will of a business, see CONTRACT.

As to liability of vendor of town bonds which are afterwards declared void, see TOWN BONDS.

As to effect of fraudulent representations on credit given on a sale, see FRAUDS.

VENUE.

Affidavit and notice to change venue for convenience of witnesses should set out the grounds for belief that witnesses are material. *Kelly v. Maltham et al.* 173

Whether an order of special term changing place of trial for convenience of witnesses is appealable, *quære*. *Kellogg v. Smith*. 431

Where papers under such an order are transmitted from one department to another the appeal must be taken in the latter. *Ib.*

An action to compel the assignment of a bond and mortgage is local, and must be tried in the county where the land is situated. *Dings v. Parshall*. 456

WAIVER.

A declaration in the recognizance by which the prisoner is released on his own signature, that he elects to be tried by the Court of Special Sessions, no subsequent demand for trial by jury being made, is a waiver of the right of trial by jury. *In the matter of Swan*. 114

The local agent of an insurance company who has authority to take applications and collect premiums and transmit them to the company, cannot waive compliance with the condition of a policy requiring proof of loss to be made within a specified time, where the policy required all waivers and modifications to be in writing and signed by an officer of the company. *Van Allen v. Farmers Joint Stock Ins. Co.* 408

An agent of an insurance company may waive by parol a condition in a policy, even where the policy requires any waiver to be endorsed on the policy. *Newton v. Allemania Fire Ins. Co.* 599

As to waiver of submission of questions to the jury on trial, see PRACTICE.

As to waiver of irregularity in service, see SERVICE.

WAREHOUSEMEN.

The transfer of a warehouse receipt, although in blank, and the transferee unknown to the warehouseman, yet if the latter have notice of transfer, he becomes the bailee of the transferee, and is bound to hold the deposit for him as owner. *Central Savings Bank v. Garrison*. 301

Where a warehouseman, having general notice of the transfer of a receipt given by him, permits the property to be taken from him by legal process, he will be liable to the transferee for the amount advanced by him on the receipt. *Ib.*

WARRANTY.

Where answers are responsive to direct questions asked by an insurance company, they are to be regarded as warranties, where not responsive, but volunteered without being called for, they are mere representations. *Buell v. the Conn. Mutual Life Ins. Co.* 161

The defendant having sold a cow to plaintiff, a farmer, with a warranty that she was free from foot and mouth disease, and the plaintiff having placed the cow with other cows, whereby the latter became infected with the disease and died, the defendant is liable for the entire loss. *Smith v. Green*. 238

On an executory contract for the sale of "large Bristol cabbage" seeds, there is an implied warranty that the seeds sold will produce "large Bristol cabbages." *White v. Trustees of the Shakers*. 368

The measure of damages is the loss sustained by the failure of the crop. *Ib.*

In an action for breach of warranty in building a canal boat, the plaintiff can recover, 1. Difference between value of boat as she was and as she ought to be. 2. Special damages by delays and injuries on first trip before defects could be ascertained. *Zuller et al v. Rodgers et al.* 413

When a party uses a large portion of goods sold to him, after an opportunity to examine them, he must be deemed to have accepted them, and to have waived any implied warranty. *Dounce v. Dow et al.* 536

A statement made by a party a year before the sale that he was receiving "xx pipe iron," which was tough and soft, is not a warranty that all the iron of that brand which he might there after sell was of that character. *Ib.*

WEIGHT OF EVIDENCE.

It is error to refuse to charge that where there are two witnesses contradicting each other, if the jury find both equally worthy of credit, their testimony is balanced, and plaintiff fails to establish his case. *Rogers v. Goud*. 69

WILLS.

When the will of one who is deaf and dumb, or unable to read or write and speak, is presented for probate, there must be not only proof of the factum of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will and that he was cognizant of its provisions. *Kollwagen v. Kollwagen et al.* 123

A paper in the form of a bond signed by decedent, to take effect after his death, and in the devisee's possession is a will. *Frew et al. v. Clark*. 137

A bequest of money to a legatee for her support during her natural life and with power to use so much of the principal as might be necessary for that purpose, with a remainder over to the testator's children, is valid. *Smith et al. v. Van Nostrand*. 228

It is competent for the testator to make the life legatee custodian of the money, in which case such legatee becomes the trustee for the children. *Ib.*

A condition in the will in restraint of the second marriage, whether of a man or woman, is not void. *Allen v. Jackson*. 308

Devise to C. M. for life, and in the event of his leaving a son born or to be born in due time after his decease who should live to attain the

age of twenty-one, then to such son and his heirs if he should live to attain twenty-one, with remainder over: *Held*, That on the death of C. M. his infantson took a vested estate in the devised property, subject to be divested if he should die under twenty-one. *Muskett v. Eaton*. 330

In proceedings to have a will admitted to probate, an inquisition of lunacy previously found raises a presumption of testator's incapacity, which it requires some evidence to overcome. *Searles et al. exrs., v. Harvey et al.* 359

The attestation clauses to a will in the precise form provided by statute, are not essential prerequisites to its validity, nor is the clause declaring the selection of the executor. *Sisters of Charity, etc., v. Kelly et al.* 382

Where the signature of the testator occurs after the disposing clause in the will, and before the attestation clauses, in a blank in the last clause of the will appointing the executor, the signature will be regarded as a signing at the end of the will, according to the provisions of the statute. *Id.*

In construing a bequest under a will, the intention of the testator from the whole will must govern. *Watrous v. Smith*. 404

A bequest that executors sell all personal and real estate, convert same into money and pay to a person named interest on \$8,000 of sum realized, is a special legacy, and not demonstrative. *Id.*

A direction by a testatrix, a married woman, to each of her children to give a note for past services rendered, does not made the claim for such services a charge upon the estate. *Eisen-lord v. Snyder, et al., exrs.* 466

A legacy which is made payable upon the happening of a certain event is a conditional one; and that event not happening, the legacy sinks into the residue. *Taylor v. Lambert*. 469

Where an estate is given to a person described by relation, either to the testator or to other devisees, on a contingency, a person in being at the time of making the will, to whom the description would apply on the happening of the contingency, is intended to be the devisee. *Anshutz v. Miller*. 485

Where by a will several legacies are left, and then the testator leaves all the rest, residue and remainder of the real and personal estate to other parties, without creating any express fund for payment of legacies, the real estate is charged with the legacies. *Ragan v. Allen et al.* 527

The provisions of a will which provides that the executors shall place the proceeds of collection of debts due testator and all his property real and personal at interest on bond and mortgage or otherwise, as in their judgment they may deem best, and that the proceeds, rent, income, or interest should be used for the support of testator's wife and children, and devising and bequeathing all his property to the children on the death of the wife, are too indefinite to authorize a conclusion that the executors were bound to sell the real estate in any event. *Gourley, admr. v. Cum, bel et al.* 542

The personal property being sufficient to support and educate the children and maintain the widow, the land retains its original character and descends to the heirs. *Id.*

As to impeachment of will which has been admitted to probate, see EVIDENCE.

As to competency of devisee to prove its execution, see WITNESS.

WITNESS.

The devisee named in a will is a competent witness under the Act of 1869 (Pa.) to prove its execution. *Frew et al v. Clark*. 137

As to attorney of party being a witness for such party, see EVIDENCE.

As to impeachment of witness, see EVIDENCE.

As to exemption of from service of summons, see SERVICE.

WRIT OF ERROR.

An order quashing a writ of habeas corpus can only be reviewed by an appeal from the order. *People ex rel Donovan v. Conner, sheriff*. 504

See CRIMINAL PRACTICE.

Ex. G. A. A.

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